TITLE DEEDS

AND

THE RUDIMENTS OF REAL PROPERTY LAW

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BY

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PREFACE

TO THE

THIRD EDITION

INQUIRIES for this book have been frequent during the enforced hiatus in its publication consequent upon the war. It has now been carefully revised and certain important points elaborated.

As explained in the preface to the first edition, the work was designed, originally, for the use of banking men, and was the outcome, in a large measure, of practical experience in the examination of titles. The style adopted is less severely technical than that usually met with in legal treatises, and, perhaps, is better calculated, therefore, to appeal to the ordinary lay mind. The author would like to add that, as regards neither this edition nor the preceding ones, has he received any personal assistance whatever.

Interest in the subject of Land Transfer is very general at the present time, by reason of the recent appearance of the Report of the Land Transfer Committee, and of the fact that a measure, termed the Law of Property Bill, embodying that Committee's recommendations, has been framed by Mr. B. L. Cherry, and has already been referred to a Joint Committee of both Houses. The moment chosen for a re-issue of this book may therefore be regarded as opportune. Without some knowledge of Real Property Law, as it exists in this country to-day, it would be impossible to take any intelligent interest in the progress of the measure.

The following are some of the more striking changes contemplated by the Bill, namely—

1. All copyhold and customary tenures to be enfranchised.

2. Every estate in fee simple in freehold land, whether in possession, reversion, or remainder (with certain reservations), to be assimilated to, and have all the incidents

of, a chattel real estate held for a term of years certain, save that such estates shall continue in perpetuity. As a natural corollary, the Statute of Uses to be repealed ; and, as a further effect of the clause, the law of primogeniture to be abolished.

3. Only certain estates as defined (principally the fee simple and terms of years), to be recognised as legal estates. All others, including life estates, to be equitable only ; the idea being that all equitable estates shall be placed " behind a curtain," and that a purchaser in good faith shall be freed from any obligations to look behind the curtain.

4. As regards settlements, amongst other provisions, all property to be entailable, but the entail only to take effect in equity. Also, the rule precluding the tying up of property to an unborn child for life with succession to his unborn child, to be done away with.

5. Mortgages to be by way of demise only ; so that there might be several legal estates in the same land, including that of the mortgagor.

6. The length of title required under open contract to be reduced.

7. The principle of compulsory registration to be extended.

Many other points are dealt with, but enough have been mentioned to indicate the importance of the measure, not only to the profession but also to the public at large.

London, 1920.

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CHAPTER I

FEUDAL TENURE

AFTER the Norman Conquest the Conqueror bestowed upon his followers certain large tracts of land that had belonged to his English opponents, to be held by them under military service. That is to say, in return for such grants the recipients pledged themselves to provide the sovereign, on occasion, with so many armed men. Some of his opponents, who submitted, were allowed to receive back their lands on similar conditions. The king himself was the arbiter in every case of the amount of service assessed.

A bestowal of land, in early days, was the usual recompense for services.[a] So we find the great barons or landowners, in order to fulfil their obligations to the king, bestowing their lands, for similar services, on their knights as under-tenants; and the knights, in turn, bestowing their holdings on inferior tenants, in exchange for all manner of services, often agricultural in character.

Such a grant of land was called a *feud*, the recipient being described as the *feudatory* or *vassal* of his lord; and the system itself, which had its origin on the continent, was that now designated the *feudal system*.

It came to pass that, under this system, all lands were considered to have been granted out by or derived from the sovereign, and therefore holden, mediately or immediately, of the crown.[b] In reality this was often, more or

[a] *Vide* Williams on *Real Property*.

[b] *Vide* Kerr's *Student's Blackstone*. (Note.—Blackstone's famous Commentaries were first published at the end of the eighteenth century.)

less, a fiction of law ; but it became a fundamental maxim, which, as will be seen, was the fruitful source of harassment and oppression. To this day the ownership of land, in English law, is never absolute, unless held by the crown. The owner of land has only the tenure of it. Goods, on the other hand, are held in absolute ownership.[a]

Another feature of this system in early times was the judicial authority that subsisted in the lord. He was both judge and legislator as regards all his feudatories. Thus arose the manorial courts. And presently the feudatories were bound to attend the lord's own court, known as the *Court Baron*, to assist him in the business thereof. As well as being suitors they were required to constitute juries for the trial of their fellows. Similarly, the barons themselves were liable to do suit at the king's court.

The most honourable service was *knight* or *military service*, of which the principal attributes, other than the actual military service itself and suit of courts, were, usually, homage, fealty, and the more vexatious ones of relief, wardship, marriage and escheat.

The actual military service, Blackstone tells us, degenerated into assessment, being often compounded for by a single payment called *scutage* or *escuage* (literally—*service of the shield*).[b] *Homage* was usually done to the lord on investiture, the tenant solemnly professing that from that day forth he did become the lord's man, etc. It is described by Littleton as "the most honourable and most humble service of reverence that a frank tenant may do to his lord."[c] By the oath of *fealty* the tenant professed faith and loyalty to his lord, undertaking to do the customs and services required in respect of the tenure, etc.

Littleton says, "that tenant which holdeth his land

[a] *Vide* Williams on *Real Property*.
[b] *Vide* Kerr's *Student's Blackstone*.
[c] Littleton's *Tenures* (edited by Wambaugh). (Note.—Sir Thomas Littleton was a judge in the reign of Edward IV.)

by escuage holdeth by knight service. And he that holdeth by escuage holds by homage, fealty, and escuage." And again, "homage by itself maketh not knight service."[a]

Relief was of the nature of a fine, payable by the heir on succession. The incident of *wardship* permitted the lord to enter into full possession of the land if, and whilst, the tenant was under a certain age. That of *marriage* extended to him the right of the giving in marriage of his ward : if his wishes were thwarted in this direction he was entitled to look to the land for heavy recompense. Whilst, under his *escheat*, the land came back to the lord in the event of failure in the tenant's heirs.

It appears that as the Norman barons, after the Conquest, more and more gained the ascendancy, so the laws of the country bore, increasingly, the impress of the Norman jurisdiction ; a jurisdiction that was characterised by the refinement of chicanery and subtlety. The families of all the nobility, as Blackstone says, groaned under the burdens which were laid upon them by Norman lawyers in pursuance of the new system of tenure. And as escuage superseded actual military service, so the advantages of the feudal system declined, nothing but the hardships remaining.

To quote from Pollock and Maitland's well-known work,[b] "Speaking roughly, we may say there is one century, 1066-1166, in which military tenures are really military, though as yet there is little law about them ; that there is another century, 1166-1266, during which the tenures still supply the army, though chiefly by supplying the pay of the army ; and that when Edward I is on the throne, the military organisation, which we call feudal, has already broken down and will no longer supply either the soldiers or money, save in very inadequate amounts The tenant will really neither fight nor pay scutage ; but the law about military tenure has become evolved

[a] Littleton's *Tenures* (edited by Wambaugh).
[b] Pollock and Maitland's *History of English Law*.

(as part rather of our private than of our public law), and there will be harsh and intricate law about reliefs and wardships and marriages that his lord can claim because the tenure is military."

Another kind of feudal tenure was that of the *free-sokemen*. These held land at fixed rents and by personal or agricultural services, not of a servile or onerous character. This form of tenure was exempt from some of the worst incidents of tenure in knight service, especially those of wardship and marriage.

Not all lands in the country were granted out under military service by the Conqueror. Some occupiers would appear to have been left pretty much in undisturbed possession of their holdings.[a] These were generally of the superior peasant class (superior, that is, to the villeins), occupying ancient folk-land of the Saxons attached to such tracts of land as were reserved by the crown (afterwards called *crown-lands*). And there appears to have survived, with regard to them, a considerable share of Saxon liberty. It is true the maxim obtained that all lands had originally been granted out by the sovereign ; but to such land as that now under review it was considered the law of military tenure did not attach. The law of feudal tenure, to some extent, attached to all lands, but, from the peculiar incidents of military tenure, this was considered to be exempt. Thus, probably, was evolved the principle of what came to be known as *socage tenure*.[b]

The principle so evolved seems gradually to have been laid hold of by different classes ; and presently the term "*socage tenure*" came to embrace *all* feuds held by services of a determinable character other than knight service ; *e.g.*, where land was granted for part rent and part service (other than knight service) ; or for full or

[a] *Vide* Kerr's *Student's Blackstone*.

[b] Littleton observes that the word *socage* is derived from *soke*, a plough; a large portion of the socage tenants having, in ancient times, to plough for certain days the lord's lands. (Littleton's *Tenures*, edited by Wambaugh.)

rack rent only ; as also where land was given as an out and out gift at merely a nominal rent.

In course of time services incident to socage tenure came to be commuted for money payments, known as *quit rents*, signifying quit of service, which, as the value of money declined, came eventually to be almost negligible quantities.[a]

The term *holding in socage* embraced also *holding in burgage*, which was the tenure of the tradesmen in the towns. These tenants held their lands at money rents, (usually of the king) ; and were amongst those, who, after the Conquest, succeeded in retaining some degree of their ancient freedom.

So also did it include the peculiar form of tenure known as *gavelkind* (from *gafol*, a rent), which still exists in some parts, especially in Kent. We shall find, with regard to it, a survival of the ancient laws of descent in socage holding, which originally differed from those pertaining to other estates of inheritance.[b]

It is certain that holdings in socage multiplied, and that there was a steady expansion upwards.

We will now pass on to the third principal form of tenure in the feudal age, viz., that of *villenage*.

In Saxon times there were people attached to the land who were practically in a state of servitude, being regarded by the lord much in the same light as he regarded his stock or cattle. They were, however, permitted to hold small plots of land for the support of themselves and families ; *but entirely at the lord's pleasure*. After the Conquest, these *villani*, or villagers, still remained attached to the *manors* (the *manors* generally corresponding with the villages into which the land was divided up), and became, under the feudal system, the *holders in villenage*. In return for villein services they were allowed to retain their small holdings. For some while, however, their condition appears to have become increasingly depressed.

[a] *Vide* Williams on *Real Property*.
[b] *Vide* p. 46.

Their tenure, at the best, was extremely unstable, depending, as it did, entirely on the lord's will, without any protection whatever from the common law of the country. Therein holding in villenage differed fundamentally from tenures in knight service and socage, which were *freeholdings* : holdings, that is, held by service not of the nature of servile. Only the freeholders held feudally. To hold for villein service was not freeholding. The freeholders alone could claim protection from the common law. [a]

It appears to have been the factor of uncertainty with regard to the agricultural services attaching to a tenure that rendered it unfree. The distinguishing mark of villenage was the liability of the tenant to be called on, at the lord's pleasure, to perform services that were unfixed ; more usually of a base character (and this in addition to other and well-defined agricultural services). [b]

The tenant in villenage, then, had no redress for dispossession or other grievance, except from the lord ; and as against the lord himself he had no redress whatever. But, even so, a rough sort of justice seems to have obtained in course of time. The villein could be heard at the manorial court ; where, however, the lord was sole judge. [c] And from time immemorial customs had arisen round this system of villein holding, which, to some considerable extent, were retained after the Norman Conquest. These customs varied in different manors, but whatever they were, they came to acquire the force of local law. Because this form of tenure was based so largely on custom, the holders acquired the designation of *customary tenants*, and their courts were known as *customary courts*.

For long, it appears, there were no records of these customs. They were simply oral and traditional. But

[a] *Vide* Williams on *Real Property*.
[b] *Vide* Pollock and Maitland's *History of English Law*.
[c] The Court Baron before referred to (p. 2), which was the court of the freeholders, appears to have been a severance from the old manorial court.

by the time of Bracton,[a] the lords had begun to keep customary court rolls, on which the names of the tenants were entered. And, as the practice spread, the copy of the court roll came to be regarded as the tenant's title to his holding. Hence the more modern designation of *copyholders* (that is, holders by copy of court roll).

The three principal forms of tenure in feudal times, then, were knight service, socage, and villenage. Thus we find that in the manors (which themselves were often but parcels of larger manors) there were usually lands of three kinds: (1) The demesne, strictly so-called, held by knight service;[b] (2) the land of the lord's freehold tenants, held by various services, some of a military and some of a socage character; and (3) the *villenagium*, held by villein or customary tenure. The last-named, as has been seen, was for long of so precarious a nature as barely to be deserving of the designation of tenure. Let us return, for the present, to our examination of the other two, the recognised freeholdings.

Under the feudal system, in this country, freeholds were always *inheritable;* that is, passed to the heirs. Williams says it is to express an estate hereditary, as well as feudal, that the word *feodum*, or *feudum* (*fief* in French, and in English *fee*) was used.[c]

A man's *estate* in land is the extent of his interest in it; the greatest he can have being an estate *in fee simple*. A tenant in fee simple is said to be *seised of the land in his demesne as of fee* (*seisin* denoting *possession;* more literally, *a sitting on*). This is an estate inheritable by heirs generally and now practically the same thing as an absolute

[a] Bracton was a judge in the reign of Henry III. His treatise is the chief authority on the laws of the period. It has been styled "the crown and flower of English mediaeval jurisprudence." (*Vide* Pollock and Maitland's *History of English Law*.)

[b] Portions of this were let to be farmed, under yearly payments. The relationship set up seems, however, to have been rather that of landowner and bailiff than the more modern one of landlord and tenant.

[c] Williams on *Real Property*.

ownership ; although, in theory at least, still held by service of the king, or of some mesne, that is, intermediate, lord.

In England, a tenant in fee simple, originally, was not permitted to dispose of his land without the consent of his lord. And thus arose the system known as *sub-infeudation.*[a] The *tenant in capite* granted in fee portions of his land to others, to be held by them either in military service or in socage. In relation to such tenants he became the mesne lord, whilst continuing, with regard to his own superior lord (the sovereign), the relationship of tenant. He would no longer be seised of the land *in his demesne*, but *in service*. In exchange for the regular performance of required services he assured the newly created tenants in the possession of their holdings. Such tenants, as has been seen, held their land under all sorts of services ; and as the system spread, so it became more and more involved. Litigation, vexatious and oppressive in character, became general in the manorial and county courts. But in the reign of Henry II, the authority of the king's court was, by the appointment of permanent judges, itinerant and otherwise, largely broadened. "Above all local customs," we read, "rose the custom of the king's court."[b] It administered not strict law merely but also equity, and gradually it evolved some sort of classification of services, tending, at the same time, firmly to establish the rights and remedies of the freeholders.

In the reign of Edward I a great step forward was made in the direction of simplification, by the passing of the *Statute of Quia Emptores ;* whereby the practice of sub-infeudation was effectually stopped. Thenceforward it was impossible for a man to grant land in *fee simple* to be held *by services to himself.* But, on the other hand, any free man might dispose of any portion of his freeholding, to be held *by the same services*, or by a fair apportionment

[a] *Vide* Williams on *Real Property.*
[b] Pollock and Maitland's *History of English Law.*

thereof, *and of the same lord as he himself held.* All manors existing at the present day, therefore, must have come into being before the passing of the statute. It was no longer possible to create the relationship of a lord and his feudatories.

In earlier feudal times, again, a tenant in fee simple could not *alienate* his land without the consent of the heir ; not even, originally, by sub-infeudation. The heir was considered to have some estate in the land. But this conception appears to have steadily dwindled, until, in the reign of Henry III, any such estate ceased to be recognised at all.[a]

So, too, the rights of the lord gradually waned. The services to the lord ran with the land, so that an under-tenant by sub-infeudation was liable to have his chattels distrained upon to answer such services. But the *Statute of Quia Emptores* gave every freeholder authority to dispose of his land at his own free will ; and therefore the right of escheat, that incident under which the land reverted to the primary lord for the want of an heir of the tenant (and in certain other events), was lost to such primary lord.

Even then, except where a special custom prevailed, land held in fee simple was not devisable *by will*, as it was necessary to make formal *delivery of possession* (as to which further information is given hereafter). It was devised, however, in an indirect way : and since the passing of the *Statute of Tenures*, at the time of the Restoration, every holder in fee simple has had full right to devise his land directly by will. The statute confirmed a resolution of the Long Parliament passed in 1645, and was so far made retrospective.

Thus, to some slight extent, have we endeavoured to trace the development of the law of freehold tenure in this country. We have seen how some of the fetters in restriction of freedom were removed. Vexatious incidents

[a] *Vide* Williams on *Real Property.*

with regard to the particular form of tenure known as *knight service*, still remained however. There was some mitigation at times, perhaps, from the oppression that first resulted from the impress of the Norman jurisdiction ; but the evils of the system were recurrent and pronounced over a long period of time ; and it was not till the reign of Charles II that the peculiar features of tenure by knight service were finally abolished. Then was passed the Act of Parliament already referred to, known as the *Statute of Tenures*, turning this form of tenure into free and common socage. [a]

The only incident of note that arises now (fealty being never exacted) is that of escheat, and that rarely ; as, for instance, where a bastard buys land in his lifetime and dies intestate, without descendants. A bastard has no legal parents ; nor, legally, can he have brother or sister ; and the land, subject to debts, escheats to the crown, it being seldom possible, nowadays, to say who the mesne lord may be. [b]

We will now revert, for a short space, to the subject of tenure in villenage.

Hallam tells us, on the authority of Glanvil, [c] that from the time of Henry II the villein, so-called, was absolutely dependent upon his lord's will, not only as regards the land he held for his maintenance, but as regards his own acquisitions also. And again, on the same authority,

[a] The spiritual tenure known as *frankalmoign* or *mortmain* (*i.e.*, where land was left to the Church for perpetual charitable purposes) was expressly preserved. Land was said to go into mortmain (that is, *the dead hand*) because the incidents became lost to the lord. Restrictions have, at different times, been placed on the leaving of land in mortmain. At the present time, if land is left to a charity by will, it is generally required that such lands shall be sold within a year. (*Vide* Williams on *Real Property*.) Glebe and other ecclesiastical lands are generally held by this form of tenure. (*Vide* Kelke's *Epitome of Real Property Law*.) Not uncommonly the assent of the Charity Commissioners is requisite to a purchase, mortgage, or lease, from the trustees of a charity. (*Vide* Emmet's *Notes on Perusing Titles*.)

[b] *Vide* Williams on *Real Property*.

[c] Hallam's *Middle Ages*. (Note.—Glanvil was Chief Justiciar of England under Henry II, and wrote our oldest legal text-book.)

that a villein could not buy his freedom, because the price he tendered would already have belonged to his lord. It is a source of wonderment how the English peasantry could ever have emerged from such a condition.

The lord, however, may be presumed to have regarded his villeins with somewhat the feelings of a sovereign towards his meaner subjects. The spirit of the lord was not that of commercialism. The teachings of the Church, too, were doubtless not without their effect upon the practice of the landowners. Be that as it may, it is clear that in time the tenants gained considerable ground upon their lords, and that the services became less onerous and uncertain. By the reign of Edward III great advance had been made; and by that of Edward IV the copyholders had acquired the right to bring a common law action of trespass against the lord for dispossession. So, where lords had left villeins and their children in enjoyment of land, without interruption, the common law, "of which custom is the life," entitled the tenants to prescribe against their lords.[a] As has been said, customs varied in different courts; as, for example, in the matters of succession and alienation. But, whatever the customs were, they acquired the force of law. The tenant still held at the lord's will; but this was construed as being "such a will as was agreeable to the custom of the manor." This explains the care and accuracy with which the terms of customary tenures came to be recorded on the court rolls. The customary courts themselves came to be regularly conducted; and the records afford evidence of frequent litigation arising in connection with this form of tenure.

As the law of copyhold tenure gradually developed, labour services were commuted for money rents, hired labour taking the place of personal bondage; and in the course of time this form of tenure, which opened so unpromisingly, came to be as stable and important as that of freehold itself.

[a] *Vide* Kerr's *Student's Blackstone.*

CHAPTER II

FREEHOLD ESTATES

FREEHOLDINGS were always *specifically recoverable.* Before the year 1854[a] goods wrongfully detained could not be specifically recovered: in the last resort compensation only could be obtained. Hence the origin of the word *real* (from *res*, the thing), which came to be applied to freeholds, in contradistinction to the word *personalty*, as applied to chattels (in the latter case the action being for damages *against the person*). And when, eventually, the tenure of copyholds became one of settled stability, they, too, came to be included in the realty. Leaseholds, on the other hand, however long the term, have always been included in the personality. As we shall see,[b] they never possessed the great attribute of heritability.

The expression originally employed to convey the sense of the more modern term *things real*, was *lands, tenements and hereditaments.*[c] The word *tenements*[d] had a rather wider significance than that of *lands*, including, as it did, certain intangible rights, such as an advowson, a rent, a right of common, etc. The word *hereditaments* was the most comprehensive of all, including whatever might be inherited.[e]

Hereditaments are of two kinds—*corporeal* and *incorporeal. Corporeal* hereditaments are material and affect the senses. *Incorporeal* hereditaments are immaterial. They do not appeal to the senses, and exist only

[a] By a statute passed in this year, the person wrongfully detaining could be compelled to deliver up the actual goods, without the option of merely making compensation. (*Vide* Williams on *Real Property.*)

[b] *Vide* Chapter VII.

[c] The expression *lands, tenements and hereditaments*, when used nowadays, does not necessarily imply only a man's freeholdings.

[d] The word *tenement* is nowadays often used to signify *a house.*

[e] Thus, an heirloom, which, by custom, descends to the heir. (*Vide* Kerr's *Student's Blackstone.*)

" in the contemplation of law." They are in the nature of rights, not clothed with the actual possession of anything tangible. Thus, such things as those mentioned above, namely, an advowson, which is the right of presentation to an ecclesiastical benefice, a rent arising out of land in the ownership of another, and a right of common, are incorporeal hereditaments.[a]

As previously observed, a man's estate in land is the extent of his interest in it, the greatest estate he can have being an estate in fee simple. It is his *demesne*, or property, belonging, as it does, to him and his heirs for ever. But it is his demesne *as of fee*, that is feudally ; the ultimate property, in theory at least, residing in the superior lord.

A fee simple is not, however, the only estate in fee. There is another estate in fee ; that known as *fee tail*. This is an estate *limited* (that is, marked out) to a man and the heirs of his body, the name coming from the French *tailler* to cut, the succession being narrowed down. When there is a further narrowing down to the particular heirs of the body, *e.g.*, by a particular wife, a *special estate tail* is created. So estates may be *tail male* or *tail female*.[b]

Both an estate in fee simple and an estate in fee tail are *freeholdings*. So also is one other estate, namely, *an estate given till some event shall happen ; but the period within which the event is to happen must be one of uncertain duration*. Thus, an estate for the duration of a life is a freeholding. An estate given for a number of years certain, however great that number, is an estate less than freehold.[c]

An estate of freehold has been defined as the possession, or seisin, of the soil by a freeman.[d]

[a] A grant was always necessary to convey an incorporeal hereditament. They were therefore said to "*lie in grant*," as distinct from corporeal hereditaments, which were said to "*lie in livery*." (*Vide* p. 14.) By the Real Property Act, 1845, corporeal hereditaments also became transferable by grant. (*Vide* Challis's *Law of Real Property*.)

[b] *Vide* Kerr's *Student's Blackstone*.

[c] *Vide* Kelke's *Epitome of Real Property Law*.

[d] *Vide* Kerr's *Student's Blackstone*.

In olden times actual possession, or *seisin*, could only be given by what was known as *livery* (*i.e.*, delivery) *of seisin*. The grantor had, formally, to quit, and the recipient, formally, to acquire the actual possession. It was rash to allow the grantor to leave his chattels on the land; or even for the recipient to entertain the grantor within a certain time after the livery.[a]

A *lease for years* was regarded as quite an inferior sort of interest to that of a freehold. For long the actual land was not recoverable on dispossession: only an action for damages could lie. There was no livery of seisin, as in the case of a gift in fee or for life.[b] And even copyholds, although they are included in the realty, are not freeholds; the seisin being in the lord of the manor, to whom is reserved such rights as those to minerals, under the soil, and to timber, above[c] (subject, however, to customary rights of the tenant). Copyhold estates have been termed *quasi freeholds*.[d] They are as similar to ordinary freeholdings as the rights of the lord and the customs of the manor will allow them to be. So, there are copyhold estates in fee simple, in fee tail and for life.

In the case of an estate in fee for life, although the tenant has the seisin, his rights of enjoyment, as we shall presently see, are less full than those of a tenant in fee simple. Still, whilst his possession lasts, no one else has any rights of enjoyment in the land.

We will, for the present, confine our attention to the subject of freehold estates in land of which the tenant is in actual present enjoyment.

We have already inquired, to some extent, into the

[a] *Vide* Kerr's *Student's Blackstone*.

[b] "It is to be understood that in a lease for years, by deed or without deed, there needs no livery of seisin." (Littleton's *Tenures*, edited by Wambaugh.)

[c] By customary rights, the lord is prohibited from trespassing on the tenant's land without leave even for planting or cutting. Hence the saying "the oak scorns to grow except on free land." (*Vide* Kelke's *Epitome of Real Property Law*.)

[d] *Vide* Williams on *Real Property*.

attributes and nature of freeholdings ; and more especially into those of *an estate in fee simple.* The latter carries with it, in the fullest degree, the rights of free enjoyment, coupled with the utmost protection from the law.[a] The land is the tenant's property to use, or abuse, at his will ; and he may keep all others from meddling with it.[b] It, alone, of freehold estates, is in the fullest sense inheritable ; and, in common with other freeholdings, it can, in a general way, be freely *alienated* (*i.e.*, disposed of) as the tenant wishes. There are, however, some few restrictions placed by law on the free alienation of estates in fee simple. We have already referred to the case of land left to a charity.[c] So, under the Bankruptcy Laws, fraudulent conveyances are voidable within certain periods of time.[d] And, again, as we shall see,[e] a property may be tied up in settlement for a while, though not in perpetuity. Or land may be given to a man until, say, his bankruptcy (an estate so created would be a freehold estate). But, a general restraint on alienation, it is not by any means possible, effectually, to impose.

Quit rents (otherwise called *chief rents*) are sometimes met with in connection with estates in fee simple. We have already seen how they arose.[f] *Rent charges*, too, are often imposed.[g] If perpetual, they are known as *fee farm rents.* Finally, a tenant in fee simple may place

[a] *Vide* Pollock and Maitland's *History of English Law.*

[b] *Vide* Challis's *Law of Real Property.* The owner is restrained, however, from doing anything with the land that may be a nuisance to his neighbour. (*Vide* Williams on *Real Property.*)

[c] *Vide* footnote, p. 10.

[d] By the Bankruptcy Act, 1914, a settlement of property that has not come to the settlor in right of his wife, other than a settlement made in good faith and for valuable consideration (marriage is a good consideration), is void against the trustee in bankruptcy of the settlor if bankruptcy ensues within two years (or within ten years if the settlor was insolvent at the date of the settlement). However, a *bonâ fide* sale of the property to a purchaser under the settlement will confer a good title against the trustee. Under the same Act, a trustee in bankruptcy can disclaim freehold property (as well as leasehold) burdened with onerous covenants.

[e] *Vide* p. 16 and Chapter III.

[f] *Vide* p. 5.

[g] *Vide* p. 48.

building, or other restrictions, on his land, which may be binding on himself as well as on his successors.[a]

Now, as regards *an estate in fee tail.*

"Tenant in fee tail," Littleton tells us, "is by force of the *Statute of Westminster* II (1285); for before the said statute all inheritances were fee simple."[b]

As in the case of fee simple, so with regard to estates tail, means were devised in olden times of alienating, not only as against the lord, but also *as against the heir.* Statutory enactment was overridden by legal fiction, which, in turn, became acknowledged law. The processes (those known as Fines and Recoveries)[c] were of a cumbersome nature. They were finally abolished in 1833 by an Act of Parliament, which provided for the *barring* (that is, putting an end to) an entail by a duly enrolled deed, and no entail, thenceforth, could be barred in any other way.

An estate can, with certainty, be tied up to the children of living persons. It cannot effectually, and with certainty, be tied up to the children of a child unborn.

It is usual, in a marriage settlement, for the husband to be given a life interest, with remainder in tail to the eldest son, subject to provisions for other members of the family (there is a proviso, if the eldest son have no child, for the second son to take in tail, and so on); a re-settlement, in practice, being effected when the tenant in tail comes of age. By his concurrence in the barring of the entail the latter is thus able to secure an immediate income charged on the estate; whereas, otherwise, he might have to wait many years before coming into any actual enjoyment.[d]

[a] *Vide* Williams on *Real Property.*

[b] Littleton's *Tenures* (edited by Wambaugh). The statute is also called the *Statute de Donis.*

[c] A *Fine* was a fictitious action, which, at a certain stage, was compromised on the terms of the property vesting, etc. A *Recovery* was also a fictitious action, the suit running through all its stages, ending with a writ directing the sheriff to give seisin, etc. (*Vide* Elphinstone's *Introduction to Conveyancing.*) A Recovery completely barred the entail. A Fine only barred the heirs.

[d] *Vide* Kelke's *Epitome of Real Property Law.*

It should be clearly understood, before going further, that an estate tail is a less estate than an estate in fee simple. If a man grant an estate in fee tail out of his fee simple, there is still something remaining to him, namely, the possibility of reversion on failure, however remote, in the direct line of issue, and before the entail has been barred. A settlement deed provides for the disposal of this *reversion.* If it is not to come back to the grantor, but is given, under the settlement, to another, it is no longer called a reversion but a *remainder.* A *part of the reversion* is also called *a remainder.*[a]

If in possession the tenant in tail has, nearly always, full power, at any time and alone, to bar the entail, the tenant becoming, by the mere act, tenant in fee simple. If a life tenant is in possession such life tenant must generally concur. So, also, must any *protector* appointed under the settlement (who, however, is usually the first life tenant), that is, if the remainders and reversions are to be barred. (In other words, if the provisions of the settlement for the disposition of the estate on failure of heirs of the body, are not to take effect.) There are a few exceptional instances, however, where an entail may not be barred. Thus, where an estate has been settled by the crown in recognition of public services. Or, again, where an estate is limited to the heirs of the body by a particular wife, and there remains no possibility of such succession.

In addition to the right of barring the entail, the tenant has the power of disposing of his life interest. Also, whilst in possession, the full right to cut timber, and to commit various other kinds of *waste ;* his position in this respect, as we shall see,[b] differing from that of an ordinary life tenant. At the same time he has all the powers of a tenant for life under the provisions of the Settled Land Acts, to which attention is now about to be directed.

[a] *Vide* Chapter IV.
[b] *Vide* p. 18.

As regards an *estate for life.*

" A tenant for term of life," says Littleton,[a] " is where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another."

When on the life of the lessee, the estate cannot, obviously, be, in his hands, an estate of inheritance. But, if A holds for the life of B, whether by original grant or by the purchase of B's life interest, the estate, whilst it lasts (that is, during B's life) *is* an estate of inheritance ; provided, however, that the gift is to A *and his heirs.* This proviso introduces an important point to our consideration.

From early feudal times it has been necessary, in order to create an estate of inheritance, that the gift shall be to a man *and his heirs.* If made to the individual, without the further limitation, he takes merely a life estate. At the present day, in order to convey the inheritance, it is necessary to import the words *heirs*, or other, statutory, words in lieu thereof.[b]

Formerly the same rule applied with regard to wills. But, owing to the hardships arising through the ignorance of testators on the point, the law was altered. Since 1837 a mere devise of realty is sufficient (if such appears to be the testator's intention) to confer an estate in fee simple, without the use of any technical words.[c]

There is another important distinction between life and other freehold estates ; that is, in the degree of free enjoyment permissible to the tenant. In this respect the tenant for life is much restricted. Thus, he may not open up new mines on the land ; or cut any appreciable amount of timber for his own profit. In so doing, he would be rendering himself liable to damages for waste. There is, however,

[a] Littleton's *Tenures* (edited by Wambaugh).

[b] *Vide* Challis's *Law of Real Property.* By Section 51 of the Conveyancing Act of 1881, in a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words *in fee simple*, without the word *heirs ;* and in the limitation of an estate in tail, to use the words *in tail*, without the words *heirs of the body.*

[c] There is also some relaxation in the case of trusts. (*Vide* Williams on *Real Property.*)

some relaxation in the tenant's favour where the estate is given *without impeachment of waste.*

We have had occasion above to refer to the subject of *settlements*, and we have seen how life estates are reserved thereunder. This, indeed, is the most usual form in which such estates arise.

There grew up around the modern system of settlement various recognised practices, whereby the tenant for life was empowered, in the interests of the settlement, to deal with the land in various ways.[a] The Settled Land Act of 1877 was a tentative piece of legislation, the object of which was to extend the scope of such powers, and to make them general. Then came the Settled Land Act of 1882, giving to the life tenant large statutory powers of selling, leasing, exchanging, mortgaging, improving, etc. But these powers are bestowed with the object of benefiting the settlement itself—that is, of all the parties interested therein—rather than of conferring any particular advantage on the life tenant himself. A simple means is provided of untying and disposing of the actual land comprised in a settlement, but in such a way as not to outrage the intentions and purport of the settlement. The proceeds, whatever the form, step into the place of the original lands ; they become tied up and subject, as regards both capital and income, just as the original lands were.

Whilst section 3 of the Settled Land Act of 1882 gives the life tenant power of selling, etc., the settled land,[b] section 21 regulates the disposition of the proceeds ; which are to be invested by the trustees for the purposes of the Act, or by the court. Section 6 affords large leasing powers; but every lease must be strictly in accord with the regulations laid down. Section 35 provides for realisation of

[a] *Vide* Williams on *Real Property.*

[b] That is, land, or any estate or interest in land, standing for the time being, limited to, or in trust for, any persons by way of succession. (*Vide* section 2.) Section 15 provides that the mansion park on any settled land may not be sold without the consent of the trustees of the settlement, or an order of the court.

timber ; three-fourths of the proceeds to be set aside as capital money, the remaining one-fourth to be retained by the life tenant. Section 38 provides, in certain eventualities, for the appointment of special trustees for the purposes of the Act. Section 58 enumerates those persons who, when their respective estates or interests are *in possession*, have the powers of a tenant for life under the Act.[a] Provision is made by section 45 for notices of proposed dealings with settled land to be given to the trustee and solicitor. Section 50 prohibits the alienation, by a life tenant, of his powers under the Act (although the rights of an assignee for value of the tenant's life interest are protected). Finally, this section and the following one render it impossible for the life tenant to contract, or be contracted, out of the Act.

[a] Included are a tenant for the life of another and a tenant for years determinable on life.

CHAPTER III

EQUITABLE ESTATES, AND THE EFFECT OF THE STATUTE OF USES

It appears that the judges, itinerant and otherwise, appointed by Henry II, were not endowed with plenary powers to adjudicate upon all and every question that might arise. The law, as administered by them, was the common law of the country; and in those not infrequent cases where the strict administration of the common law would have told harshly and unjustly, questions were reserved for consideration by the king and his council. A law of *equity* came to be recognised in contradistinction to the common law. In course of time, we read, litigants flocked to the Great Hall at Westminster; as "it was felt that for every wrong there should be a remedy in the court of their lord the king."[a]

Such cases as those referred to, where no remedy was found at the common law, appear presently to have been assigned to the judgment of a court sitting as a subsidiary court to the court proper of the king. This subsidiary court was presided over by the chancellor, who, "originally an ecclesiastic, was called the keeper of the king's conscience." Hence the title Court of Chancery.[b]

Like the common law, the law of equity, as administered by the Court of Chancery, was gradually built up on a series of decisions, which were accepted in the light of so many precedents. The one branch of law became as settled and binding as the other; and, as far as it went, the law of equity prevailed. As regards actual administration, the courts of law (*i.e.*, common law) and equity, were, in 1875, brought together again under the style of the High Court of Justice; but, as we shall see, equitable rights

[a] Pollock and Maitland's *History of English Law.*
[b] Williams on *Real Property.*

lost thereby none of their vigour, nor any of their distinctiveness of character.

We have already called attention to the subject of *livery of seisin.*[a] This livery of seisin was accompanied by a *feoffment* (*i.e.*, a gift of a fee). The feoffment, or gift (using the word *gift* in this connection in its old feudal sense, as a bestowal, more generally in return for services or other consideration), was not necessarily by writing. Originally, indeed, it was always effected orally, in the presence of witnesses. In any case, great care had to be exercised in the choice of the words employed in limiting (in the sense of defining), the nature of the gift. Thus, *to a man and his heirs.* Or *to a man and the heirs of his body.* Under the Statute of Frauds (Charles II) it became necessary for feoffments to be *in writing;* and, since 1845, under the Real Property Act, *by deed.*

A little degression may be allowed.

Originally, writings were *sealed;* because but few persons could write. Only important matters were reduced to writing. So it happened, when writing became more common, that important writings were still *sealed.* Sealed writings, known as *deeds,*[b] came thus to be regarded as superior to, because more formal than ordinary agreements *under hand* only. And so, to this day, in the case of a *deed,* it is not necessary to have a *consideration;* whereas, in the case of *an agreement under hand only,* a consideration is essential.[c]

Deeds are either *deed polls* or *indentures,* the latter being more generally met with. To a *deed poll* there is only one party (or two or more whose interests are similar), the date appearing at the end. It begins "Know all men by these presents that, etc." An *indenture* is between two or more parties, the date being at the beginning.

[a] *Vide* p. 14.

[b] Blackstone says in his Commentaries that a deed is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property.

[c] *Vide* Williams on *Real Property.*

The form is, "This indenture made the (date) between (parties) witnesseth, etc."[a]

In the execution of a deed the words "I deliver this as my act and deed" are orally employed. This will constitute a good delivery, even when the deed is retained. When handed to an outsider, to be delivered conditionally (as on payment of money), it is called *an escrow*.[b] A deed is generally valid without attestation.

The custom of *uses* arose in olden times in consequence of the restrictions that prevailed with regard to the free dealing with land. Land was given by one person to another to certain *uses*, or *trusts*. The *legal* (*i.e.*, common law) estate, arising by the actual feoffment and by the livery of seisin, vested in the trustee. But here the Court of Chancery stepped in and declared that the real beneficial interest in the property lay in the individual, called the *cestui que use*, to *whose use* the gift had been made. The position under the law of equity became so well defined, indeed, that when a feoffment was effected *without any consideration*, such feoffment was assumed to be to the use of, or in trust for, the feoffor himself.

Thus arose *equitable estates* in land, as distinct from *legal estates*.[c]

"Stated shortly," said Mr. Bernard Campion, in a lecture before the Institute of Bankers,[d] "one may have the legal estate; that is, in the eye of the law his title is

[a] Hutchison, in his *Practice of Banking* (Vol. III), says these now appear to constitute the chief difference between the two species of instruments.

[b] "When a deed is delivered to some person not a party to it, to take effect in certain events, it is called *an escrow*." (Elphinstone's *Introduction to Conveyancing*.) "A deed must be sealed. A wafer may be used; but a printed circle, enclosing the letters L.S., is not sufficient." (*Vide* Kelke's *Epitome of Real Property Law*.) "An impression made with ink by means of a wooden block is sufficient." (*Vide* Emmet's *Notes on Perusing Titles*.)

[c] The person who has the seisin of a freehold has the legal estate. But there may be equitable estates as opposed to legal estates in interests that are less than freehold. Thus in the case of a leasehold vested in a trustee for the benefit of a *cestui que trust*.

[d] *Vide Institute of Bankers' Journal* for January, 1907.

complete ; while another may have the equitable estate in the same land, that is, in the eye of equity he is regarded as the real beneficial owner. The legal estate is the hard dry fact upon which equity imposes its conditions and rules."

By means of uses lands were assured after death, to relatives and others, at a period long before it was possible to will them directly. By the same means lands were indirectly given to others who, by the common law, were debarred from enfeoffment.[a]

The famous *Statute of Uses*, passed in the reign of Henry VIII, aimed to abolish uses, as interfering with the lords' incidental rights. It enacted that if one person were seised of any lands to the use of, or in trust for, another, the actual seisin should forthwith, *ipso facto*, be in that other, for such estate as he had in the use or trust. The statute *executed* the seisin to the person beneficially entitled, and the estate, of whatever the description, passed outright to him. In other words, it provided that any feoffment of an hereditament to one person, to the use of another, should have the same effect in every way as though the feoffment had been direct to the person to whose use the land was given ; the nominal feoffee, therefore, getting neither legal nor beneficial interest.

But, in course of time, the ingenuity of the lawyers devised a means of circumventing the purport of the statute. By what must appeal to the ordinary lay mind as a piece of sophistical reasoning, it became established that there could be *no use upon a use*. Where land was given to one person, to the use of a second, to the use of a third, it was decided that the effect of the statute was, not to pass the legal estate right through to the third person, but only to the second person. There it stopped ;

[a] " The system played a great part during the Wars of the Roses: attainted Lancastrian or Yorkist in turn was found to have put his lands in safety by enfeoffing his lands to some convenient feoffee, guiltless of all suspicion of treachery." (Kelke's *Epitome of Real Property Law*.)

and in equity, such second person was considered to hold to the use of, or in trust for, the third. In this way the system of trusts became fully re-established.[a]

Nowadays it is regarded as sufficient, in creating a trust in freeholds, to convey *to the use of the trustee in trust for the cestui que trust* (*i.e.*, the person beneficially interested). "Various explanations," says Elphinstone, "have been given for this doctrine. Perhaps the simplest is that the express declaration of the use in favour of A (*i.e.*, the trustee) shows conclusively that he is not intended to be seised to the use of another within the meaning of the statute."[b]

It is to be observed that the statute refers only to freeholds; and it is held to affect, too, only *passive* trusts. In *special* trusts (that is, where some active duty, such as the receipt of rents, is imposed), and in trusts relating to other than freeholds, the position continued the same as before the passing of the statute. The important point is that to create a simple, passive trust in freeholds, it is now necessary to convey *to the use of* the trustee *to the use of* or *in trust for* the beneficiary. If conveyed *to the use of A in trust for B*, A is trustee for B. If conveyed simply *to A in trust for* or *to the use of B*, B takes both the legal and the beneficial interests.[c]

Again, the statute did not effect the old ruling that where land was given without any apparent consideration, it was deemed to be given in trust for the giver, unless otherwise stated. And, for this reason, in an ordinary conveyance of to-day, land is expressed to be given *unto and to the use of* the recipient. Were there no consideration, indeed, the conveyance would be only one in name—it would be absolutely without effect—unless these words

[a] *Vide* Williams on *Real Property*.
[b] Elphinstone's *Introduction to Conveyancing*.
[c] "In modern times we employ the term *uses* where we wish to vest the legal estate in a person, and *trust* where someone is to take a beneficial interest *without* legal estate." (Kelke's *Epitome of Real Property Law*.)

were employed. Where there *is* a consideration, they are not essential; but, in practice, with the lawyer's proverbial caution, they are always inserted.

It may be noted here that, directly the purchaser of a fee simple signs the contract, he acquires an equitable estate; the vendor standing to him in the light of a trustee.

We shall have occasion to revert to this question of legal as distinct from equitable estates, when discussing the subject of mortgages in a later chapter. We will merely add, at this stage, that conveyancers attach great importance to the getting in of any outstanding legal estate, on the completion of a purchase. And very rightly so, for, although the *cestui que trust* has full rights as against the trustee, who has the legal estate, still it is just possible for the latter to dispose of the property to a *bonâ fide* purchaser for value, behind the back of the *cestui que trust.*

The Statute of Uses has been made a tool of in various ways never contemplated by its promoters. Without the aid of the statute it would have been impossible to have perfected the modern system of settlement.

In the case of what is known as *a strict settlement*[a] on the occasion of a marriage between, say, A B and C D, the settlor, A B, gives land to an individual, known as the *grantee to uses*, to hold in fee simple to various uses. Thus it may be: (1) To the use of A B in fee simple until the marriage. And, after the marriage, (2) to the use of C D, creating a small rent-charge for *pin money*. Subject thereto, (3) to the use of A B for life. (4) On death of A B, to the use of C D, creating a rent-charge for *jointure.*[b] Subject thereto, (5) to the use, for 1,000 years, of trustees

[a] "*Strict Settlement* is the usual system of tying up large estates for as long a time as the law allows, by giving life estates to all living persons and estates tail in remainder thereafter to their unborn sons (or sons first and afterwards daughters) which may be made to vest at birth or twenty-one." (Kelke's *Epitome of Real Property Law.*)

[b] "Jointure, or provision, is an income given under a marriage settlement, to the wife, in lieu of dower or freebench, in case she survives the husband." (Hutchison's *Practice of Banking*, Vol. III.)

of portions for other members of the family. Subject thereto, (6) to the use of the sons of the marriage, successively, in tail male. (7) Reserving power to A B to jointure a future wife, and to charge portions for the offspring. (8) With reversion to A B in fee simple.

By force of the statute, succeeding legal estates, as limited (*i.e.*, defined) in the above outlined settlement, arise at their proper time. And, apart from the operation of the statute, it would not (as will be more fully explained in the following chapter) be practicable, as at every step, to achieve this result. In order to bring about the desired effect, the land must be given to the *grantee to uses in fee simple.* (It must *not* be given to *the use of* the *grantee to uses*). Under the statute he serves as a mere " conduit pipe " to carry the legal estate on.[a]

One other effect of this important statute remains to be noted. That is, the part it played in the development of the system of transfer by *lease and release.*

The origin and operation of this form of transfer were as follows :—

A lease was granted for a term ; and upon the lessee going into possession,[b] practically all that remained to the freeholder was an incorporeal hereditament. As we have seen,[c] incorporeal hereditaments always lay *in grant,* and not *in livery.* This incorporeal hereditament the freeholder then *released* (in the sense of giving up or relinquishing) to the lessee. Presently, even *entry* (or going into possession) was dispensed with ; on the grounds that the vendor was trustee for the purchaser,[d] and that, having the use of the land, the purchaser, by the statute, acquired also the legal estate.[e]

[a] As we have seen (p. 16), in practice, when the tenant in tail comes of age, a re-settlement is usually effected.

[b] The lessee had not the actual seisin; but, in a sense, he was in possession.

[c] *Vide* footnote, p. 13. [d] *Vide* p. 24.

[e] In the case of a lease, to this day, it is necessary for the tenant to enter before the tenancy is complete, unless the lease is by way of conveyance taking effect under the Statute of Uses. (*Vide* Williams on *Real Property.*)

Thus, for generations prior to 1841, the usual method of conveyance was by *lease and release.* The lease was for a year, and the rent merely nominal ; the release bearing date the following day.[a]

In 1841, to save expense, an Act was passed providing that a release alone should be sufficient.

In 1845 another Act was passed, whereby all corporeal hereditaments were deemed to lie in grant as well as in livery.[b] Freehold land, since then, has, in practice, always been conveyed by a *deed of grant,* now usually known as a *conveyance.*[c]

[a] *Vide* Williams on *Real Property.*

[b] *Vide* footnote, p. 13.

[c] " A feoffment by an infant, under the custom of gavelkind, is perhaps the only case in which this mode of assurance is now used in practice." (Williams on *Real Property.*)

The covenants found in the old form of release were very similar to those comprised in the deed of grant (or conveyance) which superseded it (although the operation of law differs in the two cases.) Indeed, they were not very dissimilar from those comprised in the, generally, anterior feoffment. In the case of a feoffment, as has been explained, it was necessary to have *livery of seisin,* and evidence of the livery was endorsed on the deed.

CHAPTER IV

REVERSIONS AND REMAINDERS

BRIEF reference has been made in a previous chapter[a] to those interests known as *reversions* and *remainders*.

" Land can only *revert* to the donor, or those who represent him as his heirs or assigns. If, after the expiration of one estate, land is not to come back to the donor, but to stay out for the benefit of another, then it *remains* to that other."[b]

Until they come into actual possession reversions and remainders are incorporeal hereditaments. When they fall in they become corporeal.

As has been before stated[c] incorporeal hereditaments are not clothed with the actual possession of anything tangible.

Before proceeding further it may be well to explain that, in law, a man is regarded as being in possession of property when he has, by right, the present enjoyment of it. The feudal seisin may be, and often is, in another. Thus, in the case of a lease for years, the tenant has the possession, in the generally accepted legal sense of the word, whereas the reversioner has the legal seisin, and is said to be *seised of the land*.[d] It is different where a life interest, or an estate tail, is granted out of a fee simple. These are freehold estates, and, as we have seen,[e] carry the legal seisin with them. In such a case, the reversioner is said to be *seised of the reversion*.

[a] *Vide* p. 17.
[b] Pollock and Maitland's *History of English Law*.
[c] *Vide* p. 13.
[d] Before the Real Property Act (of 1845), a conveyance of the reversion in such a case was by feoffment, with livery of seisin; therein differing from other estates in expectancy, which always lay in grant.
[e] *Vide* p. 14.

The estate, whatever it may be, that is granted out of a fee simple, is known as *the particular estate.* On the grant of the particular estate the *reversion* arises naturally. To create a *remainder* it is necessary to have a deed or will. [a]

In the case of a reversion it is possible to reserve a rent (and, indeed, it is usual so to do when the particular estate is a lease for years) ; and this, like a quit or chief rent, is a *rent service* (as distinct from *rent charges,* referred to hereafter), for the reason that it hinges on a tenure. [b] It is true that, strictly speaking, a lease for years was not a feudal tenure. Notwithstanding, it came, in olden times, to acquire some of the attributes of a feudal tenure ; and the rent paid was regarded in the light of service, just as though the leaseholder had held the seisin. Hence a conveyance of a reversion carries with it, without any express reference, the rent (as being *service*) incident thereto.

No rent service can attach to *a remainder,* as there is no *tenure.* The owner of the remainder is *not the lord.*

We have noted before that an estate in fee simple has long been fully alienable. The tenant can convey his whole estate, or he may carve out what estate he pleases. Further than this, he can carve out various estates, to succeed one another in regular order ; that is, until he has exhausted his estate in fee simple. Thus, a life interest may be given to one living person (constituting the particular estate) [c] ; to be followed by a life interest to another living person ; that to be followed by an estate tail to a third living person ; and so on. All the estates, after the first, are remainders. Unless the fee simple is disposed of at the same time, the reversion still subsists in the grantor. A grant of a final remainder to some other living person *and his heirs* would exhaust the whole estate.

[a] *Vide* Williams on *Real Property.*

[b] " The Statute of *Quia Emptores* only prohibits sub-infeudation upon gifts of land in fee simple." (Williams on *Real Property.*)

[c] On the termination of the first life estate, the next estate in possession becomes the particular estate; and so on.

Directly such a grant as that now outlined[a] is made, each estate becomes immediately vested ; and such estates are called *vested remainders*.

(A curious point is that a man may have two estates in the same land. Thus, he may have a life interest in possession, and a fee simple in remainder on determination of an intervening life estate. " To A for life ; and on his decease, to B for life ; and on his decease, to the heirs of A," gives A the fee simple subject to the life interest of B, should he outlive A. *To the heirs of A*, in this case, are construed as being words of limitation[b] only, giving A the fee simple. No remainder is thereby conveyed to the heirs).[c]

Of much more recent development than vested remainders are *contingent remainders*.

A *contingent remainder* might never vest. As distinct from a vested remainder, it is *limited to some uncertainty* : it is not necessarily ready to come into possession when the prior estates determine, and it may fail accordingly ;[d] thus, to a child on his reaching a certain age, or to the eldest son of a childless person. In either case, if the contingency happens *whilst the prior estate is in being*, the remainder will at once become a vested remainder.

A contingent remainder of freehold will fail unless contrived so as to rest on a particular estate of freehold. The seisin must be outside the grantor.[e]

Formerly, as a result of this rule, a contingent remainder failed unless it vested before, or immediately upon, the determination of the particular estate ; but this effect has been altered, in some instances, by the provisions of the Contingent Remainders Act of 1877 (as to which see later).[f]

[a] Now this can be effected by one grant. When feoffment and livery of seisin were requisite, the livery was made to the first freeholder, and the others were entitled to the seisin as their estates in turn became estates in possession.

[b] *Vide* p. 18.

[c] *Vide* Williams on *Real Property*.

[d] Contingent remainders were for long considered illegal.

[e] *Vide* Kelke's *Epitome of Real Property Law*.

[f] *Vide* p. 35.

The rule, moreover, does not apply to copyholds, where the seisin is always in the lord of the manor ; or to equitable contingent remainders, where it is in the trustees.[a]

By means of contingent remainders it thus appears that estates in fee simple are liable to lose for a while their characteristic of free alienability. Still more are they liable to do so by the comparatively modern contrivance of what are known as *executory interests*.

In the case of *executory interests* the protection of any *particular estate* is not required. They are capable of arising on the happening of some condition or event ; and of terminating, by their own strength, existing prior estates. By their means any estate can be limited after any other estate ; thus, after a fee, or after a term of years.

Executory interests are created either under the Statute of Uses, or by will. The former are known as *springing or shifting uses*.

Williams says, " When the Statute of Uses was passed, the jurisdiction of the Court of Chancery over uses was at once annihilated. But uses, in becoming, by virtue of the statute, estates at law, brought with them into the courts of law many of the attributes which they had before possessed while subjects of the Court of Chancery. Amongst others which remained untouched, was this capability of being disposed of in such a way as to create executory interests. The legal seisin or possession of lands became then, for the first time, disposable without the observance of the formalities previously required ; and amongst the dispositions allowed, were these executory interests, in which the legal seisin is shifted about from one person to another, at the mercy of the springing uses, to which the seisin has been indissolubly united by the Act of Parliament ; accordingly it now happens that by means of uses, the legal seisin or possession of lands may be shifted from one person to another in an endless variety of ways." [b]

[a] *Vide* Kelke's *Epitome of Real Property Law*.
[b] Williams on *Real Property*.

Consider further the form, outlined in the previous chapter, of a settlement on the occasion of a marriage between A B and C D. Without the aid of the Statute of Uses it would not be possible for A B so to limit an estate that he might retain the fee simple for a while, and that other estates might arise, subsequently, under such limitations. Formerly no estate could be limited after a fee simple, as it was necessary for the actual livery of seisin to take place at the time the gift was made. It was not possible to give a freehold estate in land to commence from a future day. But by means of shifting uses, on the happening of the particular event (in this case, on the taking place of the marriage), A B's estate in fee simple gives way to the next limited estate, which now springs up.[a] The statute, at once, executes this next use into a legal estate ; and so on.

It should be observed at this point that the law will construe a future interest to be a remainder, rather than an executory interest, if open to that construction ; the test being whether or not such future interest has to wait for the determination of the previous estate.[b] The reason for this is that remainders were recognised by the law long before it first took cognizance of executory interests.

What are known as *powers of appointment* also arise under the Statute of Uses.

Lands may be conveyed to A, in fee simple, to such uses as B shall, by any deed or by his will, appoint ; and in default of and until such appointment, to the use of C, in fee simple, or to any other uses. The recipient, C, thus acquires a vested estate, until and unless B, by the exercise of his power of appointment, shifts the estate away to another, or to himself. If no appointment be

[a] That is, a mere life interest to A B, subject to the legal estate in a small rent-charge for pin-money to C D (and *vide* p. 47).

A man cannot by one deed convey a freehold estate to another, reserving to himself a life interest, without the aid of the Statute of Uses.

[b] *Vide* Kelke's *Epitome of Real Property Law ;* and *vide* Challis's *Law of Real Property.*

made in B's lifetime, either by deed or by will, C becomes fully entitled to the lands in fee simple.[a]

Powers of appointment vary in kind and in degree. It is not within the province of a small treatise like the present to follow the various descriptions and classifications. They have played a large part in the development of the modern system of settlement. Since, however, the Settled Land Act of 1882 endowed the tenant for life with such large powers, there has been less occasion to call them into requisition.

Powers, generally, may be extinguished by deed of release executed by the person in whom vested, but not statutory powers, such as those given to a tenant for life under the Settled Land Act of 1882.

Executory interests may also be created by will, as has been said. They are then called *executory devises;* and do not require the execution of the statute, unless so created.[b]

Limitations may be void by *remoteness*. Thus, any executory interest is void unless it is one that must necessarily arise within the compass of existing lives and 21 years after (and, if no lives are imported, then within 21 years). And, not only is it void if, in the event, the time limit is exceeded, but it is absolutely void from the beginning.[c]

Thus, a gift, by way of executory interest, to a child unborn on his attaining some age beyond 21, would fail from the commencement. It would not take effect even were the child to be born immediately, the previous life interest falling in soon after. It is different, however,

[a] As B is fully entitled to appoint to himself, the lands are liable to be taken in execution by a judgment creditor of B. Also, in the event of B's bankruptcy, they would go to the trustee. So that, to this extent, C's estate is liable to be defeated, apart from any exercise of B's power of appointment.

[b] The tendency has been for the law of equity to assert itself more strongly with regard to wills, than with regard to other forms of assurance.

[c] *Vide* Williams on *Real Property*.

where the prior estate is an estate tail. The remoteness in this case is immaterial.

As has been mentioned above,[a] formerly any contingent remainder failed, unless it vested before, or immediately upon, the determination of the particular estate. By the Act of 1877 referred to, every contingent remainder which would have been good if originally created as an executory interest, was preserved. The rule with regard to *contingent remainders* permits of land being given to a child unborn on his attaining some age beyond 21,[b] subject to a previous life interest. Not so, as we have seen, the rule with regard to *executory interests*. It follows that, in the event of the particular estate (*i.e.*, the previous life interest) failing before the child reaches the specified age beyond 21, such contingent remainder will not be saved by the Act of 1877.[c]

Remainders, as well as executory interests, are freely alienable.

[a] *Vide* p. 31.

[b] But not, as a rule, to the unborn child of an unborn person. (*Vide* Williams on *Real Property*.)

[c] *Vide* Williams on *Real Property*; and *vide* Challis's *Law of Real Property*.

CHAPTER V

DESCENT AND DEVISE

We have already inquired to some extent into the duties and position of *trustees*. These differ materially from those of *executors,* who are persons appointed by a testator merely for the purpose of executing his will. The duties of *executors* do not, even since the passing of the Land Transfer Act of 1897 (see below), extend far beyond the payment of the testator's debts and legacies: if, under the provisions of the will, they are called upon to hold property in trust for others, they become, to that extent, *trustees*.[a]

An *administrator* is appointed by the court[b] for the purpose of administering an estate in the case of intestacy; or in the event of no executor being named in a will. An administrator takes his title from the grant of administration (although, when appointed, his title relates back to the death); an executor, from the will itself.[c] The latter's title arises at the moment of death. *Probate,* or *letters of administration,* as the case may be, are the only proper evidence of title.

There is another distinction between executors and administrators. If a surviving executor die, *his* executor (or administrator, in case of his intestacy) acts for him. In the event of an administrator dying, fresh letters of administration must be taken out.

Formerly, only personalty (including leaseholds) vested

[a] *Vide* Hutchison's *Practice of Banking* (Vol. III).

[b] That is, the Probate Division of the High Court of Justice, either through the principal registry in London, or through one of the district registries.

It is seldom more than one administrator is appointed to administer an estate. The widow usually administers; or, failing her, usually the next of kin. (The husband administers the wife's estate.) If none of the kindred administers, a creditor might do so; and failing that, any person may be appointed by the court.

[c] Although every will of personalty has to be proved.

in the executors or administrator (known as *personal representatives*) ; but now, under the Land Transfer Act of 1897, real estate also vests in them.

Since the Land Transfer Act the assent of the personal representatives is necessary before real property will effectually vest in a devisee or heir :[a] till that is obtained the devisee, at least, has only an equitable interest.[b] Realty was thus brought more into line with personalty, the law having previously required that the assent of the personal representatives was necessary before personal property (including leaseholds), that had been specifically bequeathed, should actually vest.[c] The personal representatives must be satisfied there is sufficient estate left to satisfy all debts, before giving such assent (in the case of personalty and realty alike, now).[d]

The whole of a testator's estate is now liable in respect of his debts ; but the personal estate is liable before the real, and pecuniary legacies are only payable out of realty when, directly or indirectly, charged thereon. Moreover, the rules of descent with regard to realty remain as before the Act.

In intestacy, real property devolves, to the exclusion of

[a] In the case of a devise of freeholds, an *assent* will suffice. In the case of an inheritance, a *conveyance* is necessary.

[b] In intestacy, the legal estate in a freehold property technically vests in the heir-at-law; but on administration being granted it passes to the administrator. The heir is entitled to call for a conveyance when the debts are satisfied.

As regards devises, an administrator cannot assent until after grant of administration, although an executor may do so before grant of probate. " In cases of long standing, the assent of the executor may be presumed, upon the principle that, in the absence of evidence to the contrary, executors will be deemed to have done their duty." (Emmet's *Notes on Perusing Titles.*)

[c] *Vide* Williams on *Personal Property.*

[d] One personal representative can dispose of personalty without the concurrence of the other; but, in the case of realty, all must concur.

Even before the Act of 1897, under Lord St. Leonard's Act of 1859, if a testator charged land with debts or legacy, and no specific power of sale was given by the will, trustees and executors were empowered to sell or mortgage. (*Vide* Hutchison's *Practice of Banking*, Vol. III.)

all others, on the *heir*[a] of the last person who acquired it *by purchase* (the term *by purchase* signifying, in this connection, *other than by descent; thus including devise*); the male issue being admitted before the female; with *primogeniture* (*i.e.*, seniority by birth) amongst males, but *co-parcenery* (*i.e.*, co-heirship) amongst females. If there be no lineal descendant (that is, no issue), then the succession is in the *ascending* lineal line (that is, the nearest ancestor, or his issue, as the case may be, taking first); the preference being for the male line over the female line throughout, except that male kinsmen of the half blood, in the same degree, are postponed.

To illustrate :—

An individual, B, dies intestate, leaving realty. Were B the *purchaser*, his heir would succeed. Assume, for the moment, that B leaves no child, and no brother of the whole blood, but sisters, C and D. If the father, A, is living, he takes as heir of his son, B, the purchaser; and if A dies intestate, C and D take as co-heiresses, to the exclusion of any half brother of B.

If, however, in the above illustration, B were *not the purchaser*, but the purchaser were his own father, A, from whom B had inherited, then the heir of A would be the owner. Conceivably A had another son, E, by a second marriage. E would be the heir of A, and would have the succession, to the exclusion of his half sisters, C and D.

Supposing all the issue of A (whom we will still regard as the purchaser) to have died out; on the death of A, intestate, his father, F (or F's issue, through F) would inherit. Or, failing these, then F's father, G (and so on).

In the event of failure of all male paternal ancestors and their issue, the female paternal ancestors would come in. But in this case the mother of the earlier male paternal

[a] The heir is a person appointed by the law. He is called into existence by his ancestor's decease. No man during his lifetime can have an heir. (*Vide* Williams on *Real Property*; and *vide* Challis's *Law of Real Property*.)

ancestor, and her heirs,[a] would take before the mother of the more recent male paternal ancestor.[b]

In the event of failure in this line also, then the mother, H, of the purchaser, A (or H's issue through H), would inherit. Or, failing this, the heirship would next be in *her* ascending *male* line. Finally, in the event of failure also in this last mentioned line, then the heirship must be sought in H's female line (but in this eventuality the same rule would apply as in the case of the female paternal line).[c]

In the case of personalty, the heir does not take to the exclusion of all others, as in the case of realty. The law of succession with regard to personalty is much more simple, and according to modern ideas, at least, much more equitable. Males are not preferred to females; or the paternal line to the maternal; or the whole blood to the half blood.

If an intestate leave widow and lineal descendants, the widow takes a third of the personalty, the remainder going to children in equal shares (and if any child be dead, that child's share goes to his or her children *per stirpes*[d]). If no widow, then all to children similarly. If no lineal descendant, than half to widow and half to father.

The husband of a deceased wife takes the whole of the personalty.

If a man dies intestate, leaving no widow or issue, the father takes the whole. And, if no father, mother, brothers and sisters take in equal shares. And, if no mother,

[a] A little reflection will show that such heirs, *if issue*, must be of the half blood to the purchaser, for the reason that the issue of the whole blood will already have been eliminated.

[b] It is a little difficult to the lay mind to understand why this should be. Indeed the point was long a subject of controversy even amongst the profession.

[c] An excellent table of descent appears in Williams on *Real Property*. *Vide* also the chapter on descent of a fee simple in Challis's *Law of Real Property*.

[d] That is, taking the parents' share *through the parent;* in contradistinction to *per capita;* that is, individually and in own right.

brothers and sisters take equally (if either of these be dead, the children thereof taking that one's share *per stirpes*).

On failure of all these, then to the *next of kin* in equal shares (but without right of representation by the children of anyone deceased).[a]

To ascertain the *next of kin*, each generation, up or down, counts for a degree (*e.g.*, uncle to nephew is three degrees, one upwards to common ancestor, and two downwards).[b]

Notwithstanding what has been said above, by the Intestates Act of 1890, an intestate's widow, if the intestate dies without issue, takes the whole estate, both real and personal, up to £500 in value. If valued higher, she takes £500 out of the realty and personalty rateably, and in the first instance ; and, over and above that, any share in what remains to which she would have been entitled before the Act.

We proceed, in the next instance, to consider briefly the subject of *wills*.

A will is revoked by marriage.

A will is construed as if executed immediately prior to death ; and passes, now, all the property to which the testator was entitled at the time of his death.

By the Wills Act of 1837, *any* two witnesses are sufficient to the validity of a will (not less than two) ; but no beneficial interest can be taken under a will by any witness, whether an executor or otherwise.

It appears that it is not essential to prove a will which contains only a disposition of realty, and where no executors are appointed ; not even since the Land Transfer Act of 1897.

If a devisee of realty dies in the testator's lifetime, the devise fails, except (under the Wills Act) (1) in the case of an estate tail, where the devisee has issue living at the

[a] The tables with regard to the distribution of intestates' estates, given in *Whitaker's Almanack*, are of great practical utility.

[b] *Vide* Williams on *Personal Property*.

testator's death ; or (2) in the case of a devise to any issue of the testator, if any issue of such devisee be living at testator's death.[a] Similarly, a legacy will lapse if the legatee pre-decease the testator, except (also under the Wills Act) in the case of a legatee being a child or other issue of the testator ; and then only if such legatee leave issue living at the time of the testator's death.[b]

In the interpretation of a will, it is accepted as a maxim that the intention of the testator ought to be observed ; though, if technical words have been employed, they are, primarily, to be construed technically.[c] A will is construed as a whole.

With regard to *husbands and wives*, there are some special principles affecting the general laws of succession, which should now be inquired into.

If married after 1st January, 1883, a woman can, under the provisions of the Married Women's Property Act of 1882, hold property, and deal with it, just as though she were a *feme sole.* So she can if married previously, provided the property has been acquired after that date ; but not otherwise.[d]

Let us see what the law was before that Act came into operation.

At common law, husband and wife, during *coverture*, were regarded as one person. "The wife was merged, as it were, in the husband."[e] Personalty came to him absolutely ; and, of the wife's freeholds, they became jointly seised, the husband alone taking the income during coverture. He was also entitled to his *curtesy.*

"Tenant by the curtesy of England," says Littleton,[f] "is where a man taketh a wife, seised in fee simple, or in

[a] *Vide* Williams on *Real Property.*
[b] *Vide* Williams on *Personal Property.*
[c] *Vide* p. 18, and footnote, p. 34; and *vide* Kelke on *Interpretation of Deeds.*
[d] If acquired *before*, it is subject in all respects to the pre-existing law.
[e] Williams on *Real Property.*
[f] Littleton's *Tenures* (edited by Wambaugh.)

fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female born alive, albeit the issue after dieth or liveth, yet, if the wife dies, the husband shall hold the land during his life by the law of England."[a]

The wife could not devise by will during coverture ; but, if she survived her husband, she re-entered into full possession of her freehold estates. The husband could not deal with such estates beyond the extent of his interest therein ; nor could the lands, beyond the limit of such interest, be affected by his debts. *Together* they could alienate ; but in such case it was requisite for the wife to be examined apart by a judge or two commissioners (since 1882 *one* commissioner).

Since the Act of 1882 the husband is still entitled to his curtesy ; but only in respect of such portions of the wife's realty as have not been willed or sold by her.

By common law, if a married woman were possessed of *a term of years*, her husband was at liberty to dispose thereof during coverture ; and he took, on survival. But, if *he* died first, it survived to *her*, in spite of any will. And, now, under the Act of 1882, as we have seen, she can hold and alienate precisely as though she were a *feme sole*.

The rules in equity followed pretty closely the rules in common law. It was different, however, if there was a provision in the trust that property, either real or personal, should be *for the separate benefit or use of the wife*. In that case, the husband had no voice. It was decided eventually that he had no voice if personalty were simply given to a wife *for her separate use*. So, where land was held in fee simple, *for her separate use*, without the intervention of any trustees, it appears that a wife had acquired a right of alienation alone, at a period prior to the Act of 1882. The husband was held to be simply a trustee of the legal estate for the wife.[b]

[a] Not if held other than *severally* (*i.e.*, solely) or *in common* (*vide* p. 45); and only if in actual possession.

[b] *Vide* Williams on *Real Property*.

Also, it had become permissible, as it still is, to tie up settled property for the separate use of a wife, *without power of anticipation.* These words, appearing in a will or trust deed, indicate that the property cannot be assigned or anticipated in any way during coverture, with or without the compliance of the husband ; although the wife may devise such property by will.[a]

Dower also arises out of the legal relationship of husband and wife.

" A tenant in dower," says Littleton, " is where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth ; the wife, after decease of her husband, shall be endowed of the third part of such as were her husband's during the coverture, for her life, etc." [b]

That was the law at the time of Littleton. Until the Dower Act of 1833 the wife's right of dower attached to all realty of which, at any time during coverture, the husband was solely seised in law ;[c] provided only that the wife might have had issue. Thus it was necessary for the wife to concur in any disposition of any such property, if her dower was to be released. As may readily be imagined, this was found to be very inconvenient in practice ; and various devices were tried, with more or less success, with the object of preventing the right of dower from attaching to newly-acquired land. The aid of the Statute of Uses was invoked ; land was given to uses for the purpose of barring dower. But, by the Dower Act of 1833, the right of dower was whittled down into a very small compass. Thenceforth it only extended to lands which the husband owned at his death and which he did not will away. Even

[a] Under the Conveyancing Act of 1881, the court are empowered at their discretion to give a wife an order to deal with property even if there be a restraint on anticipation; and, under the Bankruptcy Act of 1914, in the event of bankruptcy, the court are now empowered to get at the income to a limited extent.

[b] Littleton's *Tenures* (edited by Wambaugh.)

[c] Dower did not extend to equitable estates. But by the Dower Act, 1833, it was made to extend to equitable estates as well.

to such the right does not extend if the widow takes any other interest whatever therein under the will ; or if any declaration has been made against dower, for instance, in the purchase deed.[a] Moreover, the right of dower has become subordinate to all charges, debts, etc., of the husband.

It will not be out of place, in this chapter, to discuss the subjects of *joint tenancy* and *tenancy in common.*

In the case of *joint tenants,* each one, as amongst themselves, has an equal interest during life ; their position, as regards outsiders, being, at the same time, that of single ownership.

The chief feature of joint tenancy is *survivorship.* Take the instance of three joint tenants. Each, during life, has an equal share in the profits; but, when one dies, all his interest dies with him, the two survivors becoming the present joint tenants. When one of these dies the property vests absolutely in the last survivor (according, that is, to the nature of the tenure).

It is usual for trustees to hold as joint tenants ; and, in practice, the property is usually conveyed to new trustees on the death of one or more. If, however, a sole surviving trustee should die whilst the property remains vested in him solely, it vests (as trust property) in the personal representatives, and is not subject to his will.[b] There is no alteration, as regards trust property, under the Land Transfer Act of 1897 (under the Act, as we have seen, real property,[c] other than trust property, now vests, on the death of the last surviving tenant, in his personal representatives).

[a] " It has been common to insert a declaration (in a conveyance) that no widow of the purchaser shall be entitled to dower; but the practice is wrong, because, if the purchaser doesn't dispose of the property in his lifetime, and dies intestate, there is no reason why the widow's dower should be defeated in favour of the heir at law, even if a child; and certainly not if a more distant relative." (Davidson and Wadsworth's *Concise Precedents in Conveyancing.*)

[b] Section 30 of the Conveyancing Act of 1881.

[c] Including copyhold, if the tenant has not been admitted.

It is quite possible for one of several joint tenants to dispose of his interest to the others in his lifetime (although he has no disposable interest *by will*, unless he be the sole survivor). Also, a joint tenancy may be severed by any one tenant alienating his interest during his lifetime. The recipient of such a share would be tenant in common (see later) with the others, who, as amongst themselves, would remain joint tenants of the property subject to such share so alienated.

When one tenant's share is bought out by the others, this is effected by means of a *release*[a] of his interest ; for the reason that, in theory, each joint tenant is already equal owner of the whole property. In the event of alienation, however, a *conveyance* is necessary.

Tenants in common have similarly a *unity of possession ;* but there is *no right of survivorship*. Thus, the share of any one tenant can be willed away ; or, in intestacy, would be subject to the law of succession. Tenancy in common also differs from joint tenancy in that the shares may be, and often are, unequal. And, again, when one tenant in common is disposing of his share to the others, this must be effected by a *conveyance*, and not by a release ; for the reason that each tenant in common is not, in the same sense that each joint tenant is, the owner of the whole property.

A *partition order* can be obtained from the court on an action brought by any joint tenant or tenant in common ; and in cases where an agreement cannot be come to, the court may order a sale of the property.[b]

The tenures of gavelkind and burgage have already been briefly noticed.[c] Before concluding this chapter it will not be inappropriate to add, first, with regard

[a] *Vide* p. 27.

[b] The Board of Agriculture are empowered by the Inclosure Acts to make orders for partition and exchange; and these orders are effectual without any further conveyance or release. (*Vide* Williams on *Real Property*.)

[c] *Vide* p. 5.

to holding in burgage (which survives under the title of Borough English in several old cities and boroughs), that there is descent in intestacy to *the youngest son.* And, secondly, with regard to gavelkind, that, in intestacy, all sons or male collaterals take equally (this custom being a survival of the ancient law of descent in socage holding, which differed from that pertaining to other estates of inheritance) ;[a] and that the husband, under his curtesy, is entitled to only half of the profits, the widow's dower also extending to one-half instead of to a third (but both subject to special conditions).[b]

[a] " The partible quality of lands by the custom of gavelkind is undoubtedly of British origin." (Kerr's *Student's Blackstone.*)

[b] Another peculiarity is the right of alienation by enfeoffment at the age of 15. (*Vide* Kelke's *Epitome of Real Property Law.*)

CHAPTER VI

INCORPOREAL HEREDITAMENTS

In this chapter it is proposed to consider some few of the more important of the class of hereditaments that are *purely incorporeal.*

First, as regards a rent arising out of land in the ownership of another.[a] Such is *a rent charge.*

We have seen[b] that rent paid by a leaseholder is of the nature of rent service; being similar, in this respect, to chief and other kinds of quit rent.[c] These carry with them the common law right of *distress* (that is, the right of distraining on the tenant's goods and chattels on the land, should the rent fall into arrears). But a *rent charge* is not an incident of tenure. It can only be created by the deed, or by the will, of an individual having any estate in land; and only by way of a *specific charge* on the land. It is a separate incorporeal hereditament. It does not carry the common law right of distress. For this reason it was necessary, formerly, that the right should be expressly given by the grantor. But by statute, as distinct from common law, powers of distress have long been extended to all forms of rent; and such powers have now been amplified by section 44 of the Conveyancing Act of 1881.

Rent charges by way of *pin money* and *jointure* are common in settlements. The *Statute of Uses* specially directs that the person that has the use of any annual rent (C D, in the case of the settlement outlined in a previous chapter;[d] first by way of pin money, and afterwards, by way of

[a] *Vide* p. 13. [b] *Vide* p. 30.

[c] As being of the nature of rent service, they pass, by grant of the reversion or seignory (as the case may be), without express mention. (*Vide* Kelke's *Epitome of Real Property Law.*)

[d] *Vide* p. 26.

jointure) is to be deemed in actual possession and seisin thereof. (At the proper time, by force of the statute, these rent charges become, successively, absolutely vested in C D.)

Again, in some districts, it is a common thing for building land to be paid for by way of a perpetual yearly rent charge, called *a fee farm rent.* The vendor conveys in fee simple to the purchaser, to the use that the vendor and his heirs may receive the yearly rent charge agreed on; and, subject thereto, to the use of the purchaser in fee simple.[a]

Section 45 of the Conveyancing Act of 1881 provides for the redemption, under conditions, of chief and other quit rents, as well as of certain perpetual rent charges; but the section does not apply to a fee farm rent payable under a grant for building purposes. The powers conferred on the Land Commissioners are now transferred to the Board of Agriculture. And, by the Inclosure Acts, powers are conferred on the Board of Agriculture of *apportioning* all sorts of rents.

A rent charge, for a life or lives, created otherwise than by will or settlement, must, in order to secure its effectual and certain preservation, be registered in the Land Registry Office.[b]

The owner of a rent charge is not entitled to the custody of the deeds. Hence the question of the possibility of a burden by way of rent charge on a property has to be considered by any intending purchaser or mortgagee. Such intender can, up to a point, guard himself by search of the register; but only up to a point. If created by

[a] *Quia Emptores* prohibits the creation of a tenure in fee simple (*vide* p. 8); but rent charges are not incidents of tenure. Thus, Williams says: "They were formerly considered as against common right; that is as repugnant to the feudal policy, which encouraged such rents only as were incident to tenure." (Williams on *Real Property.*)

[b] To oust even such an unregistered rent charge, the purchase must be without notice. (*Vide* Kelke's *Epitome of Real Property Law.*)

will or settlement a rent charge is not a subject of registration (unless, indeed, the land be registered land under the Land Transfer Acts, as to which see later[a]) : and any covenants or declarations against such a burden by a fraudulent vendor would not avail to oust the claims of the actual owner of a rent charge that had, in fact, been already duly created in such manner.

As Williams points out, it is just possible for a man, by misrepresentation, to convey, as a fee simple, a property which he has already put into settlement, upon marriage, having reserved to himself a life interest only. Marriage being a good consideration, the settlement would prevail ; and the purchaser would find he had, in fact, only acquired the vendor's life interest.[b]

Next, as regards *rights of common* (such as, rights of feeding on another's land, or fishing in another's water).

Under the ancient manorial system some of the land was *commonable* during certain periods of the year. And so it continued to be until comparatively recent times. Most of these common fields have now, under different Acts of Parliament, been apportioned out amongst those interested ; so that, in the distribution, each has acquired his own particular piece of freehold released from all rights of common. There are survivals, however, in different parts ; and such rights of common, where they do exist, are purely incorporeal hereditaments.

So are those other rights known as *easements*, which may conveniently be classed with rights of common. Such are *rights of way*, and *rights of ancient light ;* privileges that are often found appurtenant to various properties.

By section 6 of the Conveyancing Act of 1881, all such rights and privileges enjoyed with any land, pass, by a conveyance of such land, without being mentioned therein.[c]

[a] *Vide* Chapter XI.

[b] *Vide* Williams on *Real Property.*

[c] " It is important to see that the purchaser has executed the deed where such deed contains a reservation of easement, as such reservation is only good at law on the supposition that it operates as a re-grant to the vendors of the easement." (Emmet's *Notes on Perusing Titles.*)

We will consider but two other kinds of incorporeal hereditaments; and these are somewhat closely allied, viz., *advowsons* and *tithes*.

"*Advowson* is the right (*i.e.*, perpetual right) of presentation to an ecclesiastical benefice. For when the lords of manors first built churches and appointed the tithes of those manors to be paid to the minister, the lord had the power annexed of nominating such minister as he pleased to officiate in that church, of which he was the founder, endower, or, in one word, the patron."[a]

It must be clearly understood that an advowson is no more than a mere right of presentation. In many cases this right was granted away to private individuals; the advowson ceased to be appendant to the manor. Whilst appendant, an advowson (as being an incident of tenure) passes, without special mention, by a conveyance of the manor. Any severed advowson (as being a separate incorporeal hereditament) requires to be conveyed by a deed of grant.[b]

But, sometimes, the advowson was granted away, not to a private individual, but to a spiritual corporation. When this was the case, the rectorship attached to the corporation, and the attendant emoluments were promptly annexed by them. What were termed the *great tithes*, they reserved for themselves; the *small tithes* being taken by the vicar whom they appointed to do the duties of the living.[c] Thus we have *advowsons of rectories* and *advowsons of vicarages*. (The latter have also, in many cases, ceased to be appendant, and have thereby become separate incorporeal hereditaments).

[a] Kerr's *Student's Blackstone*.

[b] *Vide* Williams on *Real Property*.

[c] The great tithes were hay, corn, wood. Small tithes, the young of animals, some fruits, and gain arising from labour. (*Vide* Harmsworth's *Encyclopaedia*.)

Hallam says: "The obligation of paying tithes, which had been originally confined to those called *predial*, or the fruits of the earth, was extended (about the year 1200), at least in theory, to every species of profit, and to the wages of every kind of labour." (Hallam's *Middle Ages*.)

At the time of the dissolution of the monasteries, the tithes held by these spiritual corporations were granted out by the crown to laymen. Such laymen became *lay rectors*; and (with regard to the tithe so acquired) were called *lay impropriators*. By Act of Parliament, tithes so acquired by laymen were declared to be hereditaments.

The sale of an advowson does not include the next presentation if the living be vacant at the time (that would be *simony*).

By the Benefice Act of 1897, unless it be appendant to an estate, an advowson cannot be sold by public auction. And, by the same Act, it has been rendered impossible to convey anything short of the whole interest in an advowson (except by way of mortgage).

Tithes were, originally, the payment of one-tenth of such things as annually increase or render an annual crop. It would appear that they were not invariably of the nature of a free will offering.[a]

By the Tithe Commutation Act of 1836, nearly all tithe was commuted into *tithe rent charge*.[b] This is a fluctuating sum, depending on the value of wheat, oats or barley,[c] the idea being that it shall be such a sum as will purchase a quantity of grain equal to that which could have been bought in 1836 with the amount then paid for tithes. For the purpose of arriving at the amount to be paid at the off-set, the land was valued, the corn producing quality of the land being taken as the basis of such valuation. With the constant fall in the value of corn before the war, the land, in many instances, went out of cultivation, as not producing sufficient even to pay the tithe rent charge. The rise in prices has since, of course, conduced to a considerable increase in tithe rent charge.

[a] "There are direct proofs that this species of ecclesiastical property was acquired with considerable opposition." (Hallam's *Middle Ages*.)

[b] By arrangement, a considerable quantity of tithe had been compounded for before.

[c] A seven years' average is taken.

At the same time an *extraordinary tithe* was imposed on land not yielding grain. By an Act of 1886 it was provided that any fresh land coming under cultivation should be exempt from such burden. And, by the same Act, existing extraordinary tithe was capitalised, 4 per cent. being payable thereon.

The Tithe Act of 1891 deals with the recovery of tithe rent charge.[a] Not more than two years' charge is recoverable. The owners only, and not the occupiers, are liable ; and no one is personally liable.

Tithe rent charge is redeemable by arrangement on application to the Board of Agriculture, at 25 years' purchase. (Unless in the hands of outsiders it is required, of course, that the proceeds be invested for the benefit of the living.)

[a] If the charge exceeds two-thirds of the annual value of the and, a remission is allowed.

CHAPTER VII

LEASEHOLDS

We have seen that[a] a lease for years, whatever the number of years may be, is less than any freehold estate. Also that, although in the generally accepted sense of the expression, a leaseholder is *in possession*, yet he has not the legal *seisin*;[b] and that *a term of years* is not a heritable subject, but is included in the personalty.[c] We have noticed, moreover, that the rent arising under a lease[d] is rent service, being regarded as an incident of tenure (although a term of years is not strictly a tenure in the feudal sense); and that the conveyance of the reversion, accordingly, carries with it the rent payable under the lease, without any express reference being made thereto.[e]

A lease for years is known as a *chattel real*, as being a personal interest in realty. So, also, are *a tenancy at will* (where either party can terminate at will), *a tenancy at sufferance* (that is, a continuance in possession after the lawful title has determined), and *a tenancy from year to year*. This last-named requires, by common law, a half-year's notice to terminate it, such notice to expire at the particular quarter day from whence the tenancy commenced (but it may be otherwise agreed); and under the Agricultural Holdings Act of 1883, a year's notice is requisite (unless otherwise stipulated), to expire similarly.

[a] *Vide* p. 14.

[b] *Vide* pp. 12 and 14.

[c] *Vide* p. 29. When realty is left by will with a direction for sale and distribution of the proceeds amongst legatees, it becomes personalty from the moment of the testator's death. (*Vide, Law of Property*, by T. Raleigh.)

[d] "Of the import of the term *lease* (*leasum*, Saxon, *to enter lawfully; laisser*, Fr., *to let; locatio*, Latin), sometimes called *a demise* (*demissio*), it has been held that it includes a lease by a leaseholder as much as one by a freeholder." (Hutchison on *Banking*, Vol. III.) The grant of an estate for life is sometimes spoken of as a lease; but this being a freehold estate, the usual form of a lease is not applicable.

[e] *Vide* p. 30.

A tenant for a term of years long since acquired the right of specific recovery against anyone in wrongful possession, including his landlord. Also, *unless specially restrained*, he has full powers to alienate.[a]

By the Statute of Frauds and by the Real Property Act of 1845, *leases* of more than three years must be by deed.[b] (But an agreement under hand to grant a lease for more than three years may be entered into, and will, for all practical purposes, suffice.) Also, an assignment of a chattel interest in realty (other than copyhold) must be by deed. (But a charge by way of security may be under hand only, as to which see later.)[c]

It is necessary that there shall be a definite time for the termination of a lease (although, conditionally, it may come to an end earlier[d]) ; as well as a definite time for commencement (though this may be a future time[e]).

The extent of the liability of a leaseholder for *waste* is somewhat similar to that of a tenant for life. (That is, in those exceptional cases where no express covenants are entered into).

Under his covenants the lessee's liability is binding *throughout the lease.*[f]

An assignee is also liable under the covenant for rent, *so long as he owns the lease ;* as well as under the other covenants, provided they are *such as run with the land.* To come within this definition, a covenant must relate to the actual premises demised (and, if to do some act on these

[a] " Where there is a restraint on assignment, or sub-letting, a disposition which takes effect as an assignment or underlease in equity only, and not at law, is no breach of such a covenant." (Williams on *Real Property*.)

[b] And even of less than three years, if the rent reserved is not a *rack rent* (that is, a rent approximating to a full rent).

[c] *Vide* p. 95.

[d] Thus, for ninety-nine years, if so and so live so long.

[e] Being a matter of contract, and coming outside the pale of the law of freeholding. (*Vide* p. 33.)

[f] If there is no covenant for rent, although a rent be payable, the lessor's claim will be " for use and occupation rent." For this there is the old remedy by distress. (*Vide* Kelke's *Epitome of Real Property Law*.)

actual premises, the covenant must have been entered into on behalf of the lessee *and his assigns*). When an assignee disposes of the property the liability passes on to the fresh assignee. The benefit of the lessor's covenants passes on similarly.[a]

Since the reign of Henry VIII, a condition for re-entry contained in a lease extends to assignees as well as to the heirs of the lessor (previously it extended only to the heirs).

By sections 10 and 11 of the Conveyancing Act of 1881, with regard to leases made subsequent to the Act, rent and benefit of lessee's covenants, as well as obligations of lessor's covenants, run with, or become incident to, the reversion (that is, attach to the owner of the reversion for the time being).[b]

And, by section 12 (also with regard to subsequent leases), the rent and conditions of a lease are apportionable amongst the different parts of the land as severed. (With regard to other leases there is a possibility of the conditions being lost on severance of the reversionary estate).

By section 58, the benefit of the covenants belongs to the lessor's heirs and assigns (if the lessor be a freeholder), without mention; and, if he be a leaseholder, to his executors, administrators and assigns, without mention.

And, by section 59, a covenant by a lessor, although not expressed to bind the heir, binds the real and personal estates, and the heirs, executors and administrators.

Under the usual proviso for re-entry on non-payment of rent, an action will lie (if there be not sufficient distress found to satisfy the claim); and the lease will be forfeit unless all arrears and costs are paid within six months after execution of the judgment on ejectment.[c]

[a] There is said to be *a privity of estate* between the lessor and assignee.

[b] "So as to prevent such covenants losing their force on account of any technical rule consequent on a devolution of interest or other event." (J. S. Rubinstein on the *Conveyancing Acts*, 1881 *and* 1882.)

[c] Under the Common Law Procedure Acts of 1852 and 1860.

As to condition for re-entry on breach of covenant other than non-payment of rent, provision is made, under section 14 of the Conveyancing Act of 1881, for the giving of reasonable notice ; and the court is endowed with power to grant relief, if it thinks fit, on conditions. This section applies to all leases, whether made before or after the Act, with certain exceptions as to the covenants. Thus, it does not extend to covenants against assigning or underletting ;[a] or to a condition of forfeiture on bankruptcy, or on taking in execution. (But, by the Conveyancing Act of 1892, section 2, this last-mentioned condition is only to be excepted if the lessee's interest is not sold within a year of the bankruptcy, or of the taking in execution).

Under the Bankruptcy Act, 1914, a trustee in bankruptcy may disclaim leaseholds with onerous covenants, as well as freeholds.

In the case of a *sub-demise* (if only for a day or two short of the full remainder of term) there is considered to be no *privity of estate* between the original lessor and the sub-lessee ; and, as a result, the original covenants are not binding on the sub-lessee.[b] Nevertheless, if the superior lease be forfeit, the sub-lessee is liable to ejectment ; although he can claim the same relief against forfeiture as could the lessee (and the court has power to make special orders in such a case). Nor may the lessee surrender his lease to the lessor without the sub-lessee's concurrence.[c]

Long terms of years usually arise under settlements, being generally created for purposes of raising portions for younger children, jointures, or other payments of money.[d] The term is usually 1,000 years ; without the reservation of any rent. The trustees acquire, for the security of the beneficiaries, powers over the land, corresponding, almost,

[a] It seems to call for something like fraud to override a covenant against assigning or sub-letting.
[b] An underlease of the whole term is construed as an assignment.
[c] *Vide* Williams on *Real Property*.
[d] *Vide* p. 26.

to those pertaining to a fee simple. Yet the ownership of the land, subject to such payment, remains intact.

When the money so secured is paid, if *a cesser* (that is, a provision that the term shall continue only so long as necessary to give effect to the particular purpose) be *not* incorporated in the trust deed, resort is had to *a surrender* by the trustees. The owner may be a tenant for life only ; but such a tenure, as we have seen,[a] is a freehold estate, and, as such, is larger than any term of years ; and, by such surrender, the term is *merged* in the larger estate, and thereby annihilated.[b]

Section 65 of the Conveyancing Act of 1881 provides for enlargement (by a simple declaration by deed) of long terms into fee simple, where there is no money rent, and where 200 years, at least, remain unexpired out of an original term of not less than 300 years.

Under the Vendor and Purchaser Act of 1874 (section 2) a lessee or assignee of a term of years is not entitled to call for the title to the freehold (unless otherwise stipulated in the contract). And, similarly, under the Conveyancing Act of 1881 (section 3), where a term of years has been granted out of a leasehold interest, a purchaser of the sub-lease is not entitled to call for the title to the leasehold reversion ; although, on the actual grant of the sub-lease (unless otherwise stipulated in the contract) the title to the leasehold reversion must still be proved. By section 13 of the Act of 1881, however, on a lease granted by an under-lessee, the title to the leasehold reversion is not to be required.

A purchaser, under an open contract,[c] of a term of years, can call for the actual lease creating the term, whenever

[a] *Vide* p. 13.

[b] So, if any man, having a leasehold interest vested in him, acquire also the freehold reversion, the leasehold becomes *merged* in the freehold. For two estates to merge, there must be no intervening estate. Thus, a man may have a sub-lease short by one day of an original lease, and may acquire the freehold. The two estates do not merge.

[c] *Vide* Chapter IX, *re* contracts and conveyances.

granted ; though debarred from calling for the title thereto. He can also call for the title subsequent to such actual lease ; though only for 40 years next preceding the contract for sale.

By section 3 (sub-section 4 and 5) of the Conveyancing Act of 1881, on a contract for sale, the production of a receipt for the last rent due is to be evidence, unless the contrary appears,[a] that all the covenants and provisions of the lease have been duly performed and observed up to the date of the actual completion of the purchase. And that the production of the last receipt for rent under the under-lease (where the land sold is held by under-lease) is to be evidence, similarly, that all the covenants and provisions of such under-lease, as well as those of every superior lease (including payment of rent), have been duly performed and observed up to the date of the actual completion of purchase.

By section 7 of the Act of 1881, a covenant for the validity of the lease is implied by a person who is expressed to convey it *as beneficial owner* (and this, in addition to other covenants, as to which see later). And in a mortgage of the lease the use of these words implies an additional covenant to pay the rent and perform the covenants.

The lease of a house usually takes some such form[b] as follows :—

THIS INDENTURE, made the —— day of ——. BETWEEN A B of ——, in the County of ——, hereinafter called the lessor, of the one part, and C D, of ——, in the County of ——, hereinafter called the lessee, of the other part.

WITNESSETH that, in consideration of the rent and covenants hereinafter reserved and contained, the lessor doth hereby demise unto the lessee

[a] It is usual to include in conditions of sale a condition that the last receipt shall be accepted as such conclusive evidence. (*Vide* J. S. Rubinstein on the *Conveyancing Acts of* 1881 *and* 1882.)

[b] *Vide* Rubinstein's *Precedents*, and Clark's *Student's Precedents in Conveyancing.*

ALL THAT, etc.,

TO HOLD the said premises unto the lessee for the term of — years, from the —— day of ——,

YIELDING AND PAYING therefor during the said term the yearly rent of pounds, by equal quarterly payments, on the (give the dates) in every year, the first of such payments to be made on the —— day of ——, the said rent to be paid clear of all deductions.

AND the lessee doth hereby covenant with the lessor, that he, the lessee, will pay the yearly rent hereinbefore reserved on the days and in manner aforesaid.

AND will pay all rates, taxes, and outgoings now payable, or hereafter to become payable, in respect of the said premises (except the landlord's property tax[a]).

AND will keep the said premises insured against fire, etc.

AND will keep the said premises in good and substantial repair and condition.

(*Note.*—Then follows a clause giving the landlord the right to enter upon the premises for the purpose of inspection).

AND also, will, at the expiration, or sooner determination of the said term, deliver up the premises in such good and substantial repair and condition.

(*Note.*—There may follow covenants against sub-letting and assigning without the lessor's licence.)

PROVIDED ALWAYS that if any part of the said rent shall be unpaid for the space of 21 days, whether legally demanded or not, or if the lessee shall commit any breach of the covenants hereinbefore contained, the lessor may re-enter upon the said premises, and immediately thereupon the said term shall absolutely determine.

(*Note.*—Bankruptcy, or taking in execution, may also be, by terms of the lease, sufficient ground for re-entry).

AND the lessor doth hereby covenant with the lessee,

[a] In any case it is incumbent on the landlord to pay the landlord's property tax.

that the lessee, paying the said rent and performing all the said covenants hereinbefore contained, may quietly hold and enjoy the said premises during the said term without any interruption or disturbance from the lessor or any person claiming through him.

IN WITNESS, etc.

CHAPTER VIII

COPYHOLDS

We have, up to a point, already considered the subject of *copyholds*. We have seen how tenants gained ground on their lords; how customs acquired the force of law; and how this form of tenure steadily grew in stability and importance.[a] We have noticed, too, how in course of time, copyholds came to be included in the realty; and this, notwithstanding that the legal seisin remains in the lord of the manor.[b] And we have observed that there may be copyhold estates in fee simple, in fee tail, and for life.[c]

Littleton wrote[d]: "*Tenant by copy of court roll* is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, etc., at the will of the lord, according to the custom of the same manor."

And, again, "If he (the tenant) will alien, it behoveth him, after the custom, to surrender the tenements in court, etc., into the hands of the lord, to the use of him that shall have the estate, in this form or to this effect:—A of B cometh unto this court and surrendereth, in the same court, the, etc., into the hands of the lord, to the use of C of D and his heirs, or the heirs issuing of his body, or for term of life, etc. And, upon that, cometh the aforesaid C of D, and taketh of the lord in the same court, the aforesaid, etc. to have and to hold, etc., at the lord's will, after the custom

[a] *Vide* p. 11. Copyholders' rights were finally secured in the reign of Elizabeth. (*Vide* Williams on *Real Property*.)
[b] *Vide* p. 12.
[c] *Vide* p. 14.
[d] Littleton's *Tenures* (edited by Wambaugh.)

of the manor, to do and yield therefor the rents, services and customs thereof before due and accustomed, etc., and giveth the lord for a fine, etc., and maketh unto the lord his fealty, etc."

It appears that in the time of Littleton, the element of bondage was fast disappearing, and that, soon after, the modern form of copyhold tenure entirely superseded the ancient form of holding in villenage. In construction of law, though not in reality, the tenant still holds at the will of the lord. That is one of the distinguishing marks of copyhold tenure. And, of course, he still holds according to the custom of the particular manor; the customs in different manors varying considerably. Surrender into the hands of the lord and admittance of the new tenant are still requisite on a conveyance of copyhold property (though fealty is not now exacted). As we shall see, however, alienation may now take place out of court.

A devisee can claim admittance under a will.[a] An heir can claim on proving his title. (But the descent often depends upon the custom obtaining in a particular manor, and, in some cases, is quite dissimilar from that of a fee simple. *So far as custom will permit*, the descent is similar). Again, in some manors, the tenant may, in form at least, be admitted for life only; though custom may give him a right of appointment. In other cases, for the lives of others, or for a term of years; though custom may give him a right of renewal. Custom, too, may control the particular words employed in the limitation of an estate. Thus it may not be necessary to use the word *heirs*, or the expression *in fee simple*, in the creation of a copyhold estate in fee simple. Finally, by general custom, there is neither *dower* nor *curtesy*, in copyholds; though, by special custom, there may, in some form or other, be either or both.[b]

[a] Before the reign of George II, it was necessary for a testator to surrender to the use of his will.

[b] Dower, where it exists, is called a ***widow's freebench***. The Dower Act does not extend to such. (*Vide* p. 43.)

A *fine* is usually payable to the lord by every tenant, on admittance. By reason of the change in the value of money, the fine, often, is little more than nominal. If at all arbitrary by custom, fines are "in modern times restrained to two years improved value of the land after deducting quit rents."[a]

Again, on the death of a tenant, a *heriot* is, in some instances, due to the lord. (Either the best beast, or best personal chattel, or, perhaps, a money payment).

By the Copyhold Act of 1894, either the lord or the tenant may require copyhold land to be enfranchised, provision being made thereunder for compensation.

If the tenant acquire the freehold of land, the copyhold is extinguished. If the copyholder give up all his rights and interests to the lord, absolutely, the lord may admit another tenant, or may treat it as freehold. If the lord once make a common law conveyance, the copyhold is extinguished.

The Statute of Uses, as we have seen,[b] does not extend to copyholds (the seisin being in the lord). Although, in form, copyhold land is, upon a transfer of ownership, surrendered to the lord for the use of the new tenant, the lord does not pass on to such new tenant more than the surrenderor's estate. Trusts may be created by surrendering to the lord, to the use of trustees, in trust for the beneficiaries.[c]

Copyhold estates may be subjects of remainders, as well as of executory devises. Contingent remainders are not liable to failure by determination of the freehold estate, the freehold always being in the lord.[d]

Except by special custom, a copyholder, demising for more than a year without licence, will render the land liable to forfeiture.[e] He is also restrained from *waste*.[f]

[a] Williams on *Real Property*. For quit rents, *vide* p. 5.
[b] *Vide* p. 25.
[c] *Vide* p. 25.
[d] *Vide* p. 31.
[e] The tenancy, *in construction of law*, being a tenancy at will.
[f] *Vide* pp. 14 and 18.

The Land Transfer Act of 1897 does not extend to copyholds.[a]

The business of a customary court is recorded by the steward of the manor in the books, which constitute the court rolls. It was formerly necessary for at least two copyholders to be in attendance in order to regularise a court ; but, now, under the Copyhold Acts of 1841 to 1894, such attendance, generally, may be dispensed with.

With regard to alienation of copyholds ; the *surrender* may be made either in, or out of court.[b] In the one case the purchaser receives, as his title, a copy of the entry on the rolls relating to the transaction. In the other case he receives a memorandum of the transaction, signed by the lord, or his steward, and the parties, which memorandum the lord, or the steward, is required to record on the rolls.

Admittance usually takes place at the same time. To give effect to an admittance it was formerly necessary for the court to meet. But, under the provisions of the Copyhold Acts, a tenant may now be admitted by the lord, or his steward, without the holding of a court, or other formality (the admittance, of course, being entered on the rolls).[c] If the admittance be postponed (as generally happens in the case of a mortgage with *conditional surrender*, as to which see later[d]), it will, when actually effected, relate back to the surrender, giving priority over any intermediate surrenderee who may have been admitted.

Surrender and admittance are sometimes preceded by a *covenant* (under seal) *to surrender*. Such a deed would be a conveyance under the Conveyancing Act of 1881 ;

[a] *Vide* Chapter VIII.

[b] The surrender is usually made to the steward; and by the symbolical delivery of a rod or glove.

[c] " All that is really necessary for the admittance of a surrenderee is that the lord should, in some unequivocal way, express his consent to the surrenderee becoming his tenant." (Emmet's *Notes on Perusing Titles.*)

[d] *Vide* p. 89.

and covenants of title may be implied under section 7 (as to which see later [a]).

Customary freeholds, or "*copyholds of frank tenure*, or as they are sometimes called, *privileged copyholds*,"[b] are met with in different parts of the country, more especially in the North. They are a kind of hybrid tenure, between freehold and copyhold ; the tenant holding according to the custom of the particular manor, but not at the will of the lord. Such lands may be conveyed by deed, as well as by surrender ; but admittance is requisite to the completion of the title. If admittance be not a requisite (and this is sometimes the case, if the tenant have large rights of *waste* [c] over the land), it may be presumed that the tenant has the seisin, and is the actual freeholder. Occasionally it is difficult to decide in whom the seisin rests, whether in the lord or in the tenant.[d]

[a] *Vide* pp. 73 and 75. And *vide* Kelke's *Epitome of Real Property Law*.
[b] Hutchison's *Practice of Banking* (Vol. III).
[c] *Vide* p. 63.
[d] *Vide* Challis's *Law of Real Property*.

CHAPTER IX

TITLE ; AND DEEDS OF ASSURANCE

THE *Statutes of Limitation* deal with the periods of time within which particular rights in connection with land have to be asserted, in order to obviate the risk of such rights being lost. They have nothing to do with *limitations*, in the sense of marking out the extent and nature of estates, to which reference has already been made. [a]

Under the Real Property Limitation Act of 1874, which came into operation in 1879, the duration of the right of action for the recovery of land was cut down from 20 years, at which it had stood under an Act of 1833, to 12 years ; from the time, that is, when such right first accrued, or, from the date of the last written acknowledgment of the person in enjoyment. In other words, a person can now acquire *a possessory title* to land by reason of his having the undisturbed enjoyment of it for 12 years. [b]

If, however, when the right of action first accrued, the person claiming the right was under a disability, say, of infancy, or lunacy, then the land may be recovered within 6 years of the time of the discontinuance of the disability, notwithstanding that the 12 years may have already expired ; but, in such case, the land cannot be recovered after 30 years from the date of the incipiency of the right, whatever the period of disability may have been.

Again, if the owner of a *particular estate* [c] fail to go into possession, the remainderman or reversioner can bring an

[a] *Vide* p. 22.

[b] Concealed fraud will prevent the limitation from running. But a *bonâ fide* purchaser for value is protected. (*Vide* Williams on *Real Property*.)

Under the Real Property Limitation Act of 1833, " no length of possession by a person who can be considered a trustee upon an express trust will give a legal right." (Emmet's *Notes on Perusing Titles*.)

[c] *Vide* p. 30

action for recovery within 6 years of the incipiency of his (the remainderman or reversioner's) right of action, or within 12 years of the date on which the right of action first accrued to the owner of the particular estate, whichever period is longer.[a]

Under the same Act, a mortgagee must enter into possession, or take proceedings, within 12 years of the last payment of principal or interest, or within that period of time from the last written acknowledgement. Otherwise, the right of action may be lost. There is a similar limitation with regard to the payment of a legacy charged on land. The rights to rents (other than a rent reserved on a lease for years) and to tithes (when in the hands of laymen) are subject in the same manner.[b]

The limitations with regard to rents reserved on leases for years are governed by the Civil Procedure Act of 1833; which provides that actions for such rents must be brought within 20 years[c]. Under this Act, however, the right of action, although barred, may be revived by the tenant afterwards. In the other cases referred to above the right is wholly extinguished.

With respect to easements,[d] under the Prescription Act of 1832, 20 years' undisputed enjoyment is to be regarded as showing a *primâ facie* right. To upset this it would be necessary to prove that, within 40 years, the easement had been a subject of agreement. (In the case of lights,[e] 20 years' undisputed enjoyment is indefeasible).

Thus we have seen how it is possible for mere possession, alone, to confer, in course of time, a good title to land.

[a] *Vide* Kelke's *Epitome of Real Property Law.*
[b] *Vide* p. 51. *Vide* Kelke's *Epitome of Real Property Law.*
[c] If there are no covenants to proceed on, only six years' arrears can be recovered; otherwise, the whole arrears. As regards agricultural land, only one year's arrears are recoverable by distress under the Agricultural Holdings Act of 1908. And, under the Bankruptcy Act of 1914, only six months' arrears, should the lessee become bankrupt. (*Vide* Kelke's *Epitome of Real Property Law.*)
[d] *Vide* p. 49.
[e] *Vide* p. 49.

This only occurs exceptionally, however. Title to land is usually established by the evidence of wills and deeds.

We have noticed before how many dealings, of varying character and degree, there may be in any particular property ; but how, nevertheless, through them all, the fee simple must ever be legally vested somewhere or the other.[a] With copyholds, we know, the seisin is in the lord of the manor ; and, with leaseholds, of course, in the owner of the freehold reversion. But the legal estates, or what corresponds thereto, in copyhold and leasehold interests must, similarly, be existent, at all times, in some definite persons, or sets of persons. The title deeds and relative documents will disclose in whom, for the time being, an estate is vested. They are the links in the chain of title ; the weakest one in which may well prove to be the measure of the strength of the chain in the whole.

We now propose, as being, perhaps, the most illustrative course to pursue, to enquire into the *modus operandi* in the case of a sale of landed property by public auction ; and we will endeavour to illuminate the various steps as we proceed.

(1) The solicitor acting for the vendor[b] will co-operate with the auctioneer in the drafting of the *particulars of sale.*

Care is necessary, as a misdirection may invalidate a contract entered into by an unwilling purchaser.

(2) The solicitor for the vendor will prepare the *conditions of sale.*[c]

These will relate to such details as the mode of bidding, the manner of settlement, commencement of title, abstract, requisitions, etc.

[a] " As the limbs of a tree depend on the root and trunk for vitality, so do all the interests in the land depend on the fee simple." (Lecture by Mr. Bernard Campion before the Institute of Bankers, as reported in their *Journal* for January, 1907.) *Vide* Chapter IV.

[b] In practice, one solicitor sometimes acts for both parties; especially in the case of a private sale. He will endeavour to draw a contract fair to both parties.

[c] In practice, the conditions of sale and abstract are often, in complicated cases, settled by counsel; and conveyances more frequently so.

As regards the *commencement of title*, some will, or deed, will be selected, vesting the whole estate, legal and equitable. Such will, or deed, will constitute what is known as *the root of title.*

It may, with advantage, be stated here that, if property be sold under what is called *an open contract* (that is, one not comprising any stipulation as to title, or evidence of title), the purchaser of a freehold, or copyhold, can claim 40 years *marketable title*[a] (as distinct from mere *holding* title). Of course it may be necessary to go back longer in order to find an acceptable root. A conveyance, or mortgage, would constitute a good root; a mortgage preferably (see later[b]). In the case of a will the purchaser may require evidence of testator's seisin. In the case of a copyhold[c] the last admission will suffice. (And, under the Conveyancing Act of 1881, section 3, sub-section 2, if the property is an enfranchised copyhold, the purchaser will have no right to call for the title to make the enfranchisement). As to sale of leaseholds under open contract, see page 57.

Where (as, in practice, usually happens) the title is contracted to commence from a certain instrument, the vendor has only to show a good title *according to the contract.* Nevertheless, if the vendor is cognizant, even constructively, of a defect in a prior deed, he must disclose it.

Let us revert, for a moment, to the subject of conditions of sale at public auction. Property may, of course, be offered under an indifferent title. The conditions, however,

[a] *A good marketable title* is one under which property can be sold, without, necessarily, making restrictive conditions of sale as to purchaser's rights. (*Vide* Williams on *Real Property.*) *Under open contract*, 100 years' title is required in respect of advowsons. In the case of tithes, the original grant by the Crown is requisite (and 40 years' deduction of title prior to contract). In the case of a reversionary interest, title must be deduced from its creation. (*Vide* Williams on *Real Property.*)

[b] *Vide* p. 83.

[c] The surrender is retained by the steward, who supplies a copy after it has gone on the rolls (and of the admittance, when taken).

must fairly indicate the restrictions, *re* title, that are to be imposed. They must not be intentionally obscure with the object of deceiving ; but, on the contrary, they must be such as may lead at once to the detection of any defect. Otherwise the contract might be rescinded.[a] A voluntary settlement, for instance, unless its nature were disclosed, would not constitute a good root, as not importing an investigation of title at the time it was made.

(3) If the property is sold, a written *contract to complete*,[b] as per conditions of sale, is entered into by the purchaser.

(4) *Abstract of title* is prepared by the solicitor to the vendor.

The abstract is a short summary of the material parts of all instruments affecting the title to the property, from the root downwards. It must show the whole chain ; and must embrace, therefore, besides instruments, all events, such as births, deaths, marriages and bankruptcies, material to the devolution.

(5) The abstract is sent to the purchaser's solicitor, for the purpose of comparison with the deeds.

It is incumbent on a vendor to verify the abstract by the production of the original instruments abstracted, if in his possession ; and by copies of those not in his possession ; as well as to produce evidence of material facts.

By section 3, sub-section 3, of the Conveyancing Act of 1881, no instrument, prior to the date stipulated for commencement of title, can be called for ; and (unless the contrary appears), all recitals contained in such prior deeds must be accepted without question.

(By section 2 of the Vendor and Purchaser Act of 1874, recitals, statements, and descriptions contained in deeds, etc., 20 years old at the date of the contract, shall be accepted without question ; except so far as they shall be proved to be inaccurate).

[a] *Vide* G. W. Greenwood's *Practice of Conveyancing*.
[b] To comply with the requirements of the Statute of Frauds.

By section 3, sub-section 6, of the Conveyancing Act of 1881, a purchaser has to defray the cost of producing deeds, etc., and of all required information not in the vendor's possession.

By section 16, where a mortgage is dated after 1881, the mortgagor is entitled to inspect the deeds held by the mortgagee, and to take copies, on payment of the mortgagee's costs (so long, that is, as the mortgagor has the right to redeem. [a])

It should be stated here that the concurrence of all necessary parties to a conveyance must be obtained by the vendor and at his expense, unless otherwise stipulated.

By section 5, however, mortgaged lands may be sold without notice to the incumbrancer, and freed from the mortgage debt, on payment into court of a requisite sum.

The purchaser pays his solicitor for the examination of the deeds ; and, of course, for the conveyance.

(6) The purchaser's solicitor makes *searches* in the different registries.

For Land Registry and the Middlesex and Yorkshire Registries, see Chapter XI.

As to register of rent charges (other than by marriage settlement or will), see p. 48. As regards settled land there may be rent charges created under the Land Improvement Act.

For registration of disentailing assurances,[b] see p. 16.

In the event of bankruptcy, of course, a man's estates vest in his trustee ; so that it may be desirable to search the records of the Bankruptcy Courts. By the Bankruptcy Act, 1914, *bonâ fide* transactions for value in respect of after-acquired property (whether real or personal) are protected.

Deeds of arrangement, and writs or orders affecting land,

[a] *Vide* p. 82.
[b] The registry is the Central Office of the Supreme Court.

may be searched for in the office of the Land Registry.[a] As actions in progress with regard to land (*lites pendentes*) bind purchasers, if registered, search may also be made for these.

In the case of copyholds, the court rolls are, of course, always searched ; and the solicitor will also make close inquiries *re* customs, of the steward.

In practice, searches do not usually extend back beyond the last purchase deed.

(7) The purchaser's solicitor sends his *requisitions on the title.*

These are the questions on title raised on the abstract, or as a result of searches.[b]

(8) The vendor's solicitor forwards his answers. If satisfactory,

(9) The purchaser's solicitor sends draft conveyance[c] (or other, the requisite assurance).[d] If satisfactory,

(10) This is engrossed by the purchaser's solicitor.[e]

(11) *Settlement* is effected.

[a] A judgment creditor can obtain what is called a *writ of elegit* on his debtor's hereditaments. Under this writ he can be put in possession or obtain an order of sale. To oust a purchaser (*i.e.*, a person purchasing from the debtor) *for value*, registration is necessary, with re-registration every five years. Also, in the case of a deed of arrangement, registration is necessary to invalidate a sale by the debtor to a purchaser for value. (*Vide* Williams on *Real Property.*)

[b] In view of the decision in *Deeley* v. *Lloyds Bank*, 1912 (House of Lords), in the case of a bank selling under its ordinary form of mortgage, it is now usual to make a requisition as to whether the account was a running account, and, if so, whether notice had been received of a subsequent mortgage; as in that event, unless the account had been broken immediately, the bank (under Clayton's rule) would have lost priority. (*Vide* p. 94.)

[c] It is also sent for approval to the solicitors of other concurring parties, such as mortgagees. And, if a surrender of copyholds, to the steward, for his approval.

[d] In the case of a leasehold, an assignment. In the case of a copyhold, a surrender; " which is nothing more than an instrument whereby the vendor divests himself of the legal estate in the property. It cannot contain any other covenants or stipulations." (Greenwood's *Practice of Conveyancing.*) Therefore a surrender is often preceded by a *covenant to surrender ;* in which covenants may be implied. (*Vide* p. 64.)

[e] As to stamp duties, *vide* Appendix.

This takes place at the office of the solicitor to the vendor ; unless the property is in mortgage, when it takes place at the office of the mortgagee's solicitor ; the rule being that " the money follows the deeds."

All succession and estate duty must be paid before completion.[a]

The deeds are handed over on settlement.[b] (See later as to undertakings in certain cases).[c]

It may be added here, that a trustee, selling, can now give a valid discharge for consideration moneys. (It was not always so, unless by special permit.) (Trustees Act, 1893, section 20).

It now behoves us to discuss the present forms of a conveyance and an assignment (as to surrender, see p. 61).

Elphinstone says[d] : " The common forms used by conveyancers are public documents. They have been brought into their present shape by the efforts of generations of conveyancers ; and, while they have been modified from time to time in consequence of changes in the law, they remain, substantially, what they were many years ago."

We have seen[e] that, since 1845, freehold land is, in practice, always conveyed by a deed of grant (now usually known as *a conveyance*). Formerly, the word used was always *grant ;* but by section 49 of the Conveyancing Act of 1881, the use of that word in a conveyance is rendered unnecessary. The word *convey* is used very generally. In the Act itself, the words *conveyance* and *convey* (unless a contrary intention appears) include *assignment, appointment, lease, settlement, covenant to surrender,* etc.

We have learnt, already, something about the nature

[a] *Vide* Appendix.

[b] A vendor has a lien on land for unpaid purchase money as against the purchaser, as well as against persons deriving title from the purchaser voluntarily (including trustee in bankruptcy or under deed of assignment for benefit of creditors); but not against a subsequent purchaser without notice, unless his title is only equitable. (*Vide* Emmet's *Notes on Perusing Titles.*)

[c] *Vide* p. 77.

[d] Elphinstone's *Introduction to Conveyancing.*

[e] *Vide* footnote, p. 13.

of a deed[a]. A conveyance of a freehold to a purchaser in fee simple takes some such form as follows[b]:—

Parties — THIS INDENTURE, made the —— day of ——, BETWEEN A B, of ——, in the County of ——, hereinafter called the vendor, of the one part, and C D, of ——, in the County of ——, hereinafter called the purchaser, of the other part.

Recital — WHEREAS the vendor is seised of the hereditaments hereinafter conveyed for an estate of inheritance in fee simple in possession free from incumbrances,

Consideration — NOW THIS INDENTURE WITNESSETH that, in consideration of the sum of —— pounds now paid to the vendor by the purchaser, of which sum the vendor hereby acknowledges

Receipt — the receipt, the vendor, as beneficial owner,

Operative words — hereby conveys (*or* "grants") to the purchaser,

Parcels — ALL THAT——,

Habendum — TO HOLD unto and to the use of the purchaser in fee simple (*or* "his heirs and assigns," in place of the words "in fee simple").

IN WITNESS whereof the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered
by the within-named A B,
in the presence of E F.

This is a very simple form of conveyance. Let us proceed to analyse it.

[a] *Vide* p. 22.

[b] The writer has made a large acquaintanceship with deeds, He is indebted, too, to the following, viz., Clark's *Students' Conveyancing Precedents*, J. S. Rubinstein's *Precedents*, Davidson's *Concise Precedents*, G. W. Greenwood's *Precedents in Conveyancing*, etc.

First, as to *recitals*. The recital given above is sometimes inserted in the case where the property is vested in the vendor by a conveyance in fee, forming, in itself, a root of title (and in such case often no recital whatever is inserted). If by a will or mortgage such instrument should be particularised. And, if there have been dealings since the creation of the vendor's interest, these should all be recited.

It is usual, in the assignment of a leasehold, to recite the lease, and then to link up the creation of the vendor's interest by such a general recital as the following, viz. :— "And whereas by divers mesne (*i.e.*, intermediate) assignments, and ultimately by an assignment dated, etc."

"A recital," says Elphinstone,[a] "is not a necessary part of a deed ; and if there is a discrepancy between the recitals and the operative clauses, and the latter are clear and unambiguous, the recitals will not control them."

As beneficial owner are technical words, implying covenants for title,[b] under section 7 of the Conveyancing Act of 1881. Before the passing of this Act these particular covenants were usually set out in full in the conveyance. The section in question provides that, in the case of a conveyance for valuable consideration, other than by mortgage or in consideration of marriage, the following covenants are to be implied by a person conveying *as beneficial owner*, viz. :—(1) Right to convey ; (2) for quiet enjoyment ; (3) for freedom from incumbrance ; and (4) for further assurance. But these covenants are to be limited to the acts of the person so conveying and of those that have been in possession since the previous sale of the estate.

Under the same section, a covenant against incumbrances (only) is implied in any conveyance made by and

[a] Elphinstone's *Introduction to Conveyancing*.

[b] Elphinstone says, in his *Introduction to Conveyancing*, that the covenants for title are of considerable, though, perhaps, of overrated importance to the purchaser.

expressed to be made by a trustee,[a] *mortgagee, or a personal representative of a deceased person, or a committee of a lunatic so found by inquisition, or a person conveying under an order of the court.*

In a conveyance by way of *settlement,* the only covenant implied is one for further assurance ; that is, by a person who conveys, and *is expressed to convey as settlor* (and this is limited to himself and persons deriving title from him).

All the above-mentioned implied covenants *run with the land* (sub-section 6).

Under section 6, as we have seen,[b] all rights and privileges enjoyed with any land, now pass, by a conveyance of such land, without being mentioned therein. An amount of verbiage, that followed on after the description of the property, in old conveyances (known as *the general words*), is thus rendered unnecessary.[c]

By section 63 the words[d] " And all the estate, interest, right, claim, title, and demand of the said —— in, to or upon the said premises or any part thereof," which appeared in old conveyances, are also rendered superfluous.

The *habendum* is the marking out of the estate.[e]

Under section 51, as we have seen,[f] the expression *in fee simple* may now be used, instead of *heirs and assigns*; and the expression *in tail* instead of *heirs of the body.*

With regard to conveyances to corporations, the recognised wording is, " To hold unto and to the use of the purchasers, their assigns and successors for ever." No actual words of limitation are required, except in the case of a *corporation sole,* like a bishop or rector, when the use of the word " successors " is essential.

If a life interest only is being conveyed, the form is " To

[a] But by sub-section 2, if a trustee conveys, and *is expressed to convey by direction of a beneficiary,* the vendor's covenants are implied against such beneficiary.
[b] *Vide* p. 49.
[c] As to reservation of an easement, *vide* footnote, p. 49
[d] Known as *all the estate clause.*
[e] *Vide* p. 22.
[f] *Vide* footnote, p. 18.

hold for the remainder of the life of the vendor (or other, the person on whose life the property is held)."

See p. 25 as to the expression *to the use of*.

Next, as to the *custody of deeds* (where these relate to an estate of which only a portion is conveyed).

Section 9 provides that, where a person retaining possession of documents gives to another *an acknowledgment*, in writing, of the right of that other to production of those documents and to delivery of copies thereof, such acknowledgment binds the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual or person so long only as he has possession or control thereof; and the following obligations are imposed in favour of (but at the expense of) the person to whom the acknowledgment is given, or persons claiming title through him (other than as lessees) viz.: (1) To produce the documents for inspection, etc.; (2) to produce them on judicial trials; and, (3) to furnish copies. The only excuse is fire, or other inevitable accident.

If the acknowledgment be coupled with an *undertaking for safe custody*, this imposes an obligation, similarly, to keep the documents safe (unless prevented by fire or other inevitable accident). The court can award damages in case of neglect. "A trustee, or mortgagee, may safely give an acknowledgment, as he only remains liable for the documents so long as he retains them; but will not, of course, give an undertaking, which would impose upon him a liability for their safe custody."[a]

In the case of *an assignment* of a leasehold, the word *assigns* is generally used, but *conveys* answers as well. The wording may be, "He, the said A B, as beneficial owner, doth hereby assign unto the said C D all the land

[a] J. S. Rubinstein on the *Conveyancing Acts*, 1881–1882. (This view, however, is not universally accepted.)

and premises demised by the said lease, To hold unto the said C D for the residue of the term of —— years granted by the said recited lease, at the yearly rent and subject to the lessee's covenants and the conditions therein contained." (Then follow[a] covenants by the purchaser, to pay the rent and observe the covenants ; and an indemnity in respect thereof).[b]

With regard to an actual *lease*, it should be noted that, by a sub-section (5) the provisions of section 7 (as to implied covenants) are not applicable. It appears, however, that, for a long while past, something approximating to an absolute covenant for quiet enjoyment has been understood to be implied by the use, in a lease, of the word *demise*. In practice, it is usual to limit the covenant to the lessor's own acts, and the acts of persons claiming through him. As a matter of fact, this is as much as can be insisted on under an agreement to take a lease with the *usual covenants*.[c]

It should be observed that a purchase or conveyance of land *by an infant* is voidable within a reasonable time of his coming of age. (Although, as we have seen,[d] an infant may convey[e] in gavelkind. Under certain conditions, too, infants can settle other land in contemplation of marriage.)

A conveyance *by a lunatic* is invalid, unless for valuable consideration, and unless the purchaser were ignorant of the lunacy. (The Lunacy Act of 1890 confers large powers on Judges in Lunacy, acting through the committees of the estates.)

The Statutes of Mortmain[f] preclude many *corporations* from holding land without licence ; but *companies* incorporated under the Companies Acts have power to hold

[a] Because, in the case of a *sale* of a *leasehold*, these covenants are not implied.
[b] *Vide* p. 54.
[c] *Vide* Williams on *Real Property*.
[d] *Vide* footnote, p. 46. [e] But not mortgage.
[f] *Vide* footnote, p. 10.

lands, and, if compatible with the objects of their creation, they can dispose of them without licence. But there are severe limitations with regard to companies not created for the purpose of acquiring gain.

So, Municipal Corporations, subject to the Municipal Corporations Act of 1882, may not sell land without the sanction of, now, the Ministry of Health.[a]

The *liquidator* in the winding up of a company, whether voluntary or compulsory, unless subject to supervision, has power to sell the real and personal property, and to use the company's seal, without sanction of the court. If under supervision the court may impose restrictions. (Companies Consolidation Act, 1908). All liquidators should join to give a receipt.

Where an estate is sold by a vendor *with the concurrence of a mortgagee*, the wording may be (after each has acknowledged his share of the purchase money), " The mortgagee, as mortgagee, and by direction of the mortgagor, hereby conveys, and the mortgagor, as beneficial owner, hereby conveys and confirms to the purchaser, etc."

Where an estate is sold by *a tenant for life* under the Settled Land Act,[b] the wording may be, " The said A B, as beneficial owner, by virtue of the powers vested in him by the Settled Land Act, 1882, and of every or any other power in this behalf him enabling, doth hereby convey, etc." (the trustees joining to acknowledge receipt of the purchase money).

When an estate is sold by *a mortgagee* under his powers,[c] the wording may be, " He, the said A B, as mortgagee, in exercise of the powers vested in him by virtue of the said recited indenture of mortgage, and of every other power enabling him in this behalf, doth hereby convey, etc."

When an estate (freehold)[d] is sold by *personal representatives* of a deceased, the wording may be, " They, the

[a] *Vide* Williams on *Real Property*.
[b] *Vide* p. 19.
[c] *Vide* p. 87.
[d] Executors had power to assign leasehold estates before the Act.

said A B and C D, as personal representatives of the said E F, and in exercise of the power conferred on them by the Land Transfer Act, 1897, and of every or any other power enabling them, and by virtue of their estate and interest, do hereby convey, etc."

An *appointment* under a power[a] is made by way of deed poll.[b] The wording may be, " Know all men, by these presents, that we, A B and C D, in exercise of a power given to us by ——, and of every other power in this behalf us enabling, do hereby irrevocably appoint that (subject to the existing trusts as to life interests, which should be set out) one half share of the said trust funds and property shall belong to and be vested in E F, etc."

In the case of a *surrender of a life interest* in freeholds to a remainderman in fee, the wording may be, " He, the said A B, as beneficial owner, doth hereby convey and surrender unto the said C D all that ——, To hold, etc., to the intent that the estate for life of the said A B in the said premises may merge[c] and be extinguished in the reversion and inheritance thereof, etc."

And, in the case of a *release of a remainder in fee* in freeholds to a life tenant, the wording may be, " He, the said A B, as beneficial owner, doth hereby convey and release unto the said C D all that ——, To hold, etc., to the intent that the same estate for life may merge and be extinguished in the remainder and inheritance thereof, etc."

Section 53 of the Act of 1881 provides as follows :— " A deed expressed to be *supplemental* to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof."

The effect of the Conveyancing Act of 1881 has distinctly been to considerably reduce the former inordinate length of deeds. But, says Williams,[d] " When parties desire

[a] *Vide* p. 33.
[b] *Vide* p. 22.
[c] *Vide* p. 57.
[d] Williams on *Real Property*.

to provide exhaustively for several possible events, as often occurs in the case of settlements and wills, it is rarely possible to be concise without the risk of inaccuracy. In such cases, the clauses inserted are frequently based upon the old common forms, the best of which, though prolix, were marvellously accurate. And, in all drafting, due regard should always be had to the established forms, which have stood the test of long usage, and to which generations of conveyancers have contributed their skill and learning."

CHAPTER X

MORTGAGES

A *LEGAL mortgage*[a] of land is a conveyance, by way of security, of the whole or part of the estate or interest therein; the essence of the transaction being that the party conveying (*the mortgagor*) is entitled to a re-conveyance from the other party (*the mortgagee*) upon discharge of the liability so secured.

In form, the liability under a mortgage becomes due to be discharged at a specified time; and, at common law, on non-compliance with such condition, the property vests in the mortgagee absolutely. But equity long since stepped in and granted relief; and now, unless the mortgagee sells under his powers (as to which see later)[b], this right to redeem, or, as it is called, *the equity of redemption*, subsists until *foreclosure* (see p. 89), or until *statute barred* (see p. 66).[c] So well established, indeed, is this rule of equity, that any agreement by the parties to a contrary effect would be of no avail. It is in this connection that the principle has long been established, "once a mortgage, always a mortgage."

Before the Conveyancing Act of 1881, an ordinary form of mortgage was a much more formidable looking instrument than it has since become. A simple, ordinary mortgage of freeholds now takes some such form as follows[d]:—

THIS INDENTURE, made the —— day of —— BETWEEN A B, of ——, in the County of ——, hereinafter called the mortgagor, of the one part, and C D, of ——, in the County of ——, hereinafter called the mortgagee, of the other part.

WHEREAS the mortgagor is seised of the hereditaments

[a] From the French *mort gage*, because, until redemption, the mortgagee, originally, often took the rents and profits without liability to account (*vide* p. 87), and the property was thus dead to the mortgagor. (*Vide* Williams on *Real Property*.)

[b] *Vide* p. 87. [c] Twelve years' possession by morgagee without acknowledgment may bar right. [d] *Vide* footnote, p. 74.

hereby mortgaged for an estate of inheritance in fee simple in possession free from incumbrances,[a]

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of —— pounds now paid by the mortgagee to the mortgagor, the receipt whereof the mortgagor doth hereby acknowledge, the mortgagor hereby covenants with the mortgagee to pay him on the —— day of ——[b], the said sum of —— pounds, with interest thereon in the meantime at the rate of —— per centum per annum. And also, so long as any principal money shall remain due under these presents, to pay him interest thereon at the same rate by equal half-yearly payments, on the —— day of ——, and the —— day of —— in every year.[c]

AND THIS INDENTURE ALSO WITNESSETH that for the same consideration the mortgagor, as beneficial owner, hereby conveys (*or* " grants ") to the mortgagee

ALL THAT ——,

TO HOLD unto and to the use of the mortgagee in fee simple (*or* " his heirs and assigns " in place of the words " in fee simple "), subject to the proviso for redemption following, namely, that if the mortgagor, or the persons deriving title under him, shall on the — day of ——, pay to the mortgagee the sum of —— pounds, then the mortgagee, or the persons deriving title under him, will, at the request and costs of the mortgagor or persons deriving title under him, re-convey the premises to the mortgagor or the persons deriving title under him.

IN WITNESS whereof the said parties have hereunto set their hands and seals the day and year first above written.

Our observations in the previous chapter, with regard to abstract of title and settlement, are, generally, applicable as well to mortgages as to conveyances. But a mortgagee was always entitled to *absolute* covenants for title.[d] He

[a] Or larger recitals, as in the case of conveyances.

[b] Usually six months ahead.

[c] A stipulation in a mortgage to raise the interest on punctual payment is void, but a stipulation to reduce it is good. (*Vide* Williams on *Real Property*.)

[d] *Vide* p. 75.

is only *lending* his money ; and, naturally, demands every possible assurance that he will be able to get it back again. He must, as a rule, have, therefore, a good marketable title.[a] A purchaser, on the other hand, is more or less keen on getting possession of the property ; and, indeed, often buys for actual occupation. This is the import of the provision made under section 7 (*c*) of the Act of 1881, with reference to a person, who, *in a mortgage*, conveys, and is expressed to convey, *as beneficial owner*. And, again, a mortgagee is not under conditions as to time. An agreement in writing to lend on mortgage, in the unusual event of one being entered into, would hardly be specifically enforceable, like a contract for sale and purchase.

In form and in fact, the mortgage given above is an actual legal conveyance, subject to the proviso for redemption ; but, although the mortgagee acquires the legal estate (the actual seisin, in this case), equity regards the mortgagor as owner, subject to the debt to the mortgagee. Notwithstanding that the mortgagee acquires an immediate right of entry (subject, however, *to strict account*, as to which see p. 87), equity declares that he has only *a charge;* and regards him in the light of a trustee of the equity of redemption for the mortgagor. Consistently with this view, the benefit of a mortgage has for long been included in the personalty ; and, notwithstanding that the legal estate in fee was formerly inheritable, the heir was considered as holding, merely, as trustee for the personal representatives. Now, section 30 of the Act of 1881 provides that all trust and mortgage estates of inheritance vested in a person solely, shall, on his death, notwithstanding any testamentary disposition, vest in the personal representatives.[b]

[a] *Vide* footnote, p. 69.

[b] *Vide* p. 44. The Land Transfer Act of 1897 (*vide* next chapter) applies in this connection only to realty to which a deceased was entitled *for his own use*.

By the Copyhold Acts, this section does not apply to the case of copyholds if the mortgagee has been admitted.

The estate of a mortgagor in fee (the equity of redemption that is), devolves like realty ;[a] (and, unless a contrary intention is expressed, the recipient takes subject to the mortgage debt).

Whilst in possession, a mortgagor will take the rents and profits, *without being subject to account ;* may maintain actions in respect of the land ; and will not be restrained from *waste*,[b] unless the sufficiency of the security is threatened by such waste.

A mortgagor can sell his equity ; or can mortgage it. Of course, if a third party buy, such purchaser can only step into the shoes of the mortgagor. If the sale is to the mortgagee, it is necessary, in order to preserve priority (in the event, that is, of other incumbrances being in existence), that the conveyance of the equity shall expressly provide for the keeping alive of the mortgage.[c]

A mortgagor is restrained by common law from granting leases (unless otherwise agreed); but is given the following powers under section 18 of the Act of 1881, viz. :—To grant an agricultural or occupation lease, up to 21 years ; and to grant a building lease up to 99 years, (special conditions being laid down by the section). In practice, however, these powers are generally excluded by express terms of the mortgage deed.[d]

Again, a mortgagor can exercise his right of redemption, by giving six months' notice,[e] if the date of repayment is past (or by tendering interest in lieu of notice) ; and, upon redemption, he is entitled to a reconveyance at his

[a] *Vide* p. 37.
[b] *Vide* p. 18.
[c] By an Act of 1692, a mortgagor loses his equity if he mortgages without disclosing a prior mortgage of the equity. But the third mortgagee may redeem. (*Vide* Kelke's *Epitome of Real Property Law.*)
[d] If the mortgagor grant a lease notwithstanding the power be excluded, the lease is void against the mortgagee and his assigns, unless the mortgagee assumes it, which he is entitled to do.
[e] Notice is not required in equity, if the deeds were only lodged for a temporary advance. (*Vide* Williams on *Real Property.*)

own costs.[a] If necessary, he can bring *an action for redemption.* (Under section 25 of the Act of 1881, the court has power to make *an order for sale* in a redemption action.)

By section 15 of the Act of 1881, a mortgagor entitled to redeem, has power to require a mortgagee, who has not been in possession, to assign the debt and convey the property to any third person. And section 12 of the Conveyancing Act of 1882 provides that this right of the mortgagor shall belong to, and be capable of being enforced by, each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; the other incumbrancers in priority, and the mortgagor last of all, having the right of naming the transferee.

Under-mortgagees have long possessed the right to redeem prior mortgages. In the case of *Teevan* v. *Smith*, 1882, it was decided that a mortgagor was not, under section 15 of the Act of 1881, entitled to require a transfer to a third person as against the second mortgagee. It was declared to be sufficient if, before payment by the mortgagor, the second mortgagee gave notice of his intention to redeem. The purport of section 12 of the Act of 1882 was to put the question beyond all dispute.[b]

It will be perceived that, under this section, it is possible, say, for a third mortgagee to acquire the legal estate to the exclusion of the second; as the latter may not be cognizant of the former's requisition; or, learning of it, may not be able to find the money for the purpose of satisfying the first mortgagee's claim.[c]

It was also declared, in the case above referred to, that it would be a breach of contract for a first mortgagee, who had received notice of a second charge, to convey the legal estate to the mortgagor, on being paid off.

[a] *Vide* p. 82 as to twelve years' limitation.
Mortgages under the Building Society and Friendly Society Acts may be vacated by receipt endorsed on mortgage deed, which will have the effect of a re-conveyance.

[b] *Vide* Hutchison's *Practice of Banking* (Vol. III).

[c] *Vide* Rubinstein on the *Conveyancing Acts*, 1881 *and* 1882.

We have now to consider what are the rights and remedies of a legal mortgagee.

Section 19 of the Act of 1881 gives him power, at any time, to insure against fire, adding the premiums to principal.

He is entitled, as we have seen,[a] to go into possession at any time,[b] taking the rents and profits in payment of interest and actual expenses, and in reduction of principal. As far as possible, however, he usually avoids this step, by reason of the fact that he becomes liable to be called to very *strict account* by the mortgagor.

Whilst in possession, he has the same right of granting leases (under section 18) as has a mortgagor.[c]

So, whilst in possession, under section 19, he is entitled to cut and sell timber, with certain reservations.

He can sue, in the event of non-payment, on the covenant in the deed.

Sections 19 and 20 give *a power of sale* to any mortgagee *under a deed*, provided: (1) There be default in repayment for three months after demand; (2) there be default in payment of any interest for two months; or, (3) there be a breach of some other provision binding on the mortgagor.[d] Power is expressly given, under section 21, to convey, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all such as have priority to the mortgage; and, under the same section, a conveyance made in professed exercise of the power of sale, is not impeachable on the grounds that the

[a] *Vide* p. 84.

[b] *Vide* p. 67, as to twelve years' limitation. It may be mentioned here that, if twelve years have elapsed since the payment of a mortgage debt, the effect of the Statutes of Limitation will be to re-vest the legal estate in the mortgagor without a re-conveyance. (*Vide* Hutchison's *Practice of Banking*, Vol. III.)

[c] Formerly he was restrained, except by agreement, from granting leases, as not having the whole estate legal and equitable. (*Vide* Williams on *Real Property*.)

[d] These provisions may be, and often are, varied by the terms of the mortgage deed. On a sale, of course, any surplus is to be handed over to the person entitled. The power of sale previously inserted in mortgage deeds was a lengthy affair.

power was improperly exercised. The person damnified would, in such case, have redress in damages against the vendor, however. The Conveyancing Act of 1911, section 5, enacts that a purchaser is not concerned to inquire whether the power of sale has arisen. Previously he was entitled to ask the question.

Neglect to give notice to a second mortgagee of the first mortgagee's intention to sell may render the latter liable for damages.

Under the provisions of the Courts (Emergency Powers) Act, 1914 (as amended), during the continuance of the Act, no mortgagee may exercise his powers under a mortgage dated prior to 4th August, 1914, unless he was actually in possession at that date, without the sanction of the court.

Under sections 19 and 24 (1881 Act), a mortgagee can appoint *a receiver*, after the power of sale has become exercisable.

The object of the appointment of a receiver is to procure the rents and profits without going into possession.[a] The receiver is to be deemed agent of the mortgagor; and no liability for his acts or defaults shall attach to the mortgagee.

Money received by the receiver is to be applied as follows, viz. : (1) In discharge of all rents, taxes, rates, and outgoings ; (2) in keeping down all annual sums, and interest on all principal sums having priority ; (3) in payment of his commission and insurance premiums (if any), and the costs of executing proper or necessary repairs ; and (4) in payment of the interest accruing due on the mortgage debt. The residue to be paid to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

It appears that a subsequent incumbrancer can appoint a receiver ; but this does not interfere with the right of the prior incumbrancer to appoint his own.[b]

A receiver has not power to pay surplus in reduction of

[a] *Vide* p. 87.
[b] *Vide* Rubinstein on the *Conveyancing Acts of* 1881 *and* 1882.

principal. On the other hand, he can do necessary repairs out of income ; whereas the Act does *not* give a mortgagee the right to repair and charge the property.[a]

Finally, a mortgagee may *foreclose.* As in the case of an action for redemption, so in an action for foreclosure (section 25), an application may be made to the court for *an order for sale* in the alternative.

The court has, for good reason shown, power to postpone the granting of a foreclosure order ; but the order will follow, if, on the day ultimately fixed upon by the court, the money is not forthcoming.[b] The effect will be to render the property the mortgagee's own; he gets, thereby, all beneficial, as well as legal interest.

A mortgagee may pursue all his remedies together.

(See p. 56 as to mortgages of freehold lands being sometimes made by way of demise for long terms.)

A mortgage of copyholds follows pretty closely the form of mortgage given above. But, instead of a conveyance, there is a covenant to surrender to the lord, to the use of the mortgagee, subject to redemption proviso ;[c] and the mortgagee may be appointed attorney for the purpose of making the surrender. Sometimes the mortgagee rests satisfied with the covenant. At other times the conditional surrender is effected at once ; and, when the money is repaid, the steward simply enters up satisfaction, if, that is, the mortgagee has not been admitted. (In practice, he is seldom admitted, except for the purpose of enforcing the security.)[d]

A mortgage of a leasehold may be (1) of the whole term ; or (2) by way of sub-demise.

Where there are onerous covenants it is usual to mortgage by way of sub-demise for a term short, by a day or two, of the original term. There is no *privity*[e] with the lessor in this case. (There is, when the mortgage is of

[a] *Vide* Rubinstein on the *Conveyancing Acts of* 1881 *and* 1882.
[b] All subsequent mortgagees should be joined in the action.
[c] *Vide* pp. 64 and 84.
[d] *Vide* p. 64.
[e] *Vide* footnote, p. 55.

the full term.) With regard to the days not assigned, a declaration is generally inserted to the effect that the mortgagor shall stand possessed of these in trust for the mortgagee, but subject to the equity of redemption.

Section 54, sub-section 6, of the Bankruptcy Act of 1914 provides, however, that where a leasehold is disclaimed by a trustee in bankruptcy, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee, or as mortgagee by demise, except upon the terms of making such person (*a*) subject to the same liabilities and obligations as the bankrupt was subject to under the lease, in respect of the property, at the date when the bankruptcy petition was filed ; or, (*b*) if the court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date. And any mortgagee, or under-lessee, declining to accept a vesting order upon such terms, shall be excluded from all interest in and security upon the property.

As we have seen,[a] by section 7 of the Conveyancing Act of 1881, in a mortgage of a lease the use of the words *as beneficial owner* implies covenants for the validity of the lease, to pay the rent, and to perform the covenants of the lease, in addition to the four covenants for title.[b]

A *transfer of mortgage* may be by a mortgagee alone or with the concurrence of the mortgagor. The concurrence of the mortgagor will prevent questions arising thereafter. The mortgagee, *as mortgagee* (see p. 75 as to implied covenants), (1) assigns the debt ; and (2) conveys the legal estate subject to the equity of redemption. The mortgagor, *as beneficial owner*, conveys and confirms (unless he has incumbered the equity of redemption, when he merely *requests*).

Not only is a transfer cheaper than a reconveyance and new mortgage, but also, by its means, other charges may be shut out and priorities preserved.

[a] *Vide* p. 58. [b] *Vide* p. 75.

(See pp. 86 and 92 *sqq.* as to rights to call for transfers.)

With regard to *joint mortgagees*, it was formerly necessary to insert declarations to prevent the personal representatives, in the event of one of such joint tenants dying, from sharing with the survivor. Now, by section 61 of the Act of 1881, in a mortgage, obligation or transfer, the receipt of the survivor (unless there be a stipulation to the contrary) is sufficient, where money is purported to be lent either on a joint account, or jointly (without being stated to be in shares).

There is often inserted in a mortgage what is called *an attornment clause*. The mortgagor *attorns* (that is, acknowledges himself) tenant to the mortgagee, at a yearly rent of an amount approximating to the interest; the idea formerly being, in thus setting up the relationship of landlord and tenant, to give to the mortgagee the right to distrain on the mortgagor's goods, etc., on the premises. To be operative, it is now necessary, however, for the attornment to be registered within seven days, under the Bills of Sale Act, 1878. In practice, this is seldom done; but still, an attornment clause may be useful, even without registration (a nominal rent being inserted), as enabling the mortgagee, in his capacity of landlord, to sue for possession under a stipulation to the effect that he may terminate the tenancy at any time. If a mortgagee be in possession he may demise in the usual way, to the mortgagor, without registration.

It may be well to bring out, at this point, that a usual mortgage extends to landlords', but not to ordinary tenants', fixtures.[a] Under the Act of 1878, if a mortgage

[a] As between lessor and lessee, a lessee is allowed, before expiry of the lease, to remove all plant and machinery he has installed for the purpose of his business. A mortgagor, however, assigns all his interest, and the mortgage therefore covers plant and machinery, unless excluded expressly or by implication. (*Vide Bankers' Advances*, by the present writer.)

When a fixture is the subject of a hiring agreement, a mortgagee can hold it against the unpaid owner. If fixed after the date of the mortgage, the owner can remove it so long as the mortgagor is in possession, but only so long. (*Vide* Emmet's *Notes on Perusing Titles.*)

is to include anything coming under the designation of *trade machinery*, registration is requisite with regard to such machinery. But the term *trade machinery*, as used in the Act, is exclusive of (1) the fixed motive power (water-wheels, steam engines, boilers, etc.), (2) the power transmitting agency (shafting, wheels, etc.), and (3) piping. Nevertheless, it was decided in 1888 (*Batchelor* v. *Yates*, Court of Appeal) that a mortgage in fee under which trade machinery passed by reason only of being affixed to the freehold, was not an assurance requiring registration under the Act. Trade machinery may still not be sold separately, however, unless the mortgage is registered.

A form of *statutory mortgage* is given in the third schedule to the Conveyancing Act of 1881. If adopted, the deed must be expressed to be made *by way of statutory mortgage*. Covenants to pay principal and interest, and also a proviso for reconveyance, will be implied. Forms of *statutory transfer*, and *statutory reconveyance*, are also given. Except, perhaps, in cases where the amount is small, and the margin of security ample, the legal profession does not view with favour the adoption of these statutory forms, preferring to rely on older and more widely accepted precedents.[a]

A *second mortgage*, after a legal mortgage, can, of course, be an *equitable* mortgage only. Two important factors arise for consideration at this stage, namely, *tacking* and *consolidation*.

First, as regards *tacking*.

When a third mortgagee, without (*at the time of making his advance*) notice of a second mortgage, can procure a transfer of the legal estate from the first mortgagee, he can tack on the third mortgage to the first, and squeeze out the second mortgagee, who will accordingly be postponed. So, if a first legal mortgagee make further advances without notice of another charge, he can tack on such

[a] *Vide* Davidson and Wadsworth's *Concise Precedents in Conveyancing*.

further advances to the amount of his first mortgage[a] (or, he can pay off a charge to a third party and tack it on, in the absence of notice by the second). He may *not* tack advances made *after notice*. Nor may a third mortgagee tack, if, at the time of taking his security, he have notice of the second mortgage. He may do so, however, in face of *subsequent* notice. A first legal mortgagee, however, after receipt of notice of a second charge, may, conceivably, transfer to a fourth party; and this fourth party, without notice of a second charge, would be entitled to make a further advance, or to pay off a third charge, and tack the amount on to his first. The only practical way to avoid this risk is for the second mortgagee, if possible, to get a memorandum of his charge endorsed on the first mortgage deed and on the conveyance; or, at least, to be assured that his written notice is actually attached to the deeds in such a way as to saddle a transferee with notice.[b]

And now as to *consolidation*.

If a mortgagor, having mortgaged one property, subsequently procures an advance on a second property from the same mortgagee, a right of consolidation may be given, under either deed, to such mortgagee, entitling him to refuse redemption of one estate without redemption of both.[c]

A right of consolidation will be passed on by transfer of mortgage. Thus, a mortgagee of one estate may obtain a transfer of a mortgage on another estate; and will be entitled to consolidate if the clause appear in either mortgage. Consolidation can only be made, however, when there has been default on both securities. And, for the right to become operative, it is necessary, too, that the

[a] Similarly, if the first mortgagee's charge be only equitable (*vide* p. 95), he can add on further advances made in the absence of notice of another's charge. (And *vide* p. 98.)

[b] *Vide* Mr. Bernard Campion's Lecture before the Institute of Bankers, as reported in their *Journal* for March, 1907.

[c] Under section 17 of the Conveyancing Act of 1881, it is necessary for the intention to be expressed.

equity of redemption of the first property shall not have been sold or mortgaged at the time the later mortgage is given (or at the time the two mortgages are acquired by one and the same person).[a]

From what has been stated above, it will be apparent how dangerous it is to make advances on second charges, or to purchase equities of redemption.[b]

A banker's mortgage is usually designed as a *continuing security*: it is made to extend, that is, to the payment on demand of all liabilities now due or that henceforth may become due, whether alone or joint (including interest with half-yearly rests[c]—and this even if the account cease to be an ordinary banking account—and all other usual banking charges), on current account or in any other manner whatsoever. The right of the mortgagor to grant leases, under section 18 of the Act of 1881, is expressly excluded; also the restriction on the right of the mortgagee to consolidate, under section 17; and the mortgage will provide for the power of sale to arise in default of repayment in one month instead of three as required by the Act.[d]

From what has appeared above on the subject of notice by second mortgagee, the propriety of stopping a banking account on receipt of such a notice will be fully appreciated. In legal phraseology, the old account must be *closed*, and a new one opened for future transactions. The continuing character of the security ceases; and, if the account be not stopped accordingly, the banker may find that each

[a] Unless, perhaps, the assignee of the equity be saddled with notice of the existence of the consolidation clause. (*Vide* Kelke's *Epitome of Real Property Law.*)

[b] If a person has two properties mortgaged to him, and another person obtains a second mortgage on one of the properties, the court will direct the first mortgagee to realise, as far as possible, his debt out of the property other than the one subject to the second mortgage. This is termed *marshalling the securities.*

[c] To enable compound interest to be charged.

[d] The mortgage is often made to extend to the vendor's lien. (*Vide* footnote, p. 73.)

amount paid in subsequently will have gone, *pro tanto*, to diminish his prior claim ; the amounts of all subsequent payments he makes ranking after the second mortgage.[a]

An *equitable mortgage* may be created by the lodgment of title deeds, accompanied by a *memorandum of deposit*, embracing an undertaking to execute a legal mortgage when called on ; or, by mere *deposit* of the deeds (whether the property be freehold, leasehold, or copyhold) or land certificate (as to which see p. 114).

It was for long considered very doubtful whether a mere deposit of title deeds was sufficient to create an equitable mortgage on the property ; inasmuch as, by the Statute of Frauds,[b] dealings in land were required to be reduced to writing. But it was finally decided by Lord Chancellor Thurlow that the statute did not extend to the case of a deposit of deeds by way of security only. "The doctrine appears to be founded on the doctrine of part performance of a contract taking it out of the statute ; and, consequently, actual deposit as security for an actual debt or advance is a *sine quâ non*. Unless there be actual deposit the alleged equitable mortgage must rest, if at all, on a written memorandum or other document signed by the mortgagor."[c]

To create an equitable mortgage without writing, then, it is necessary that the actual deeds be deposited. (It is advisable to have the whole set.)[d] It is requisite, also, that the deeds be lodged for the purpose of affording security. But the onus of proof that they were not so lodged will lie with the depositor. The desirability of taking a *written* memorandum of deposit will thus be

[a] *Vide* footnote, p. 27 ; and *vide*, *Bankers' Advances*, by the present writer.

[b] *Vide* p. 54.

[c] Fisher's *Law of Mortgage*.

[d] But the deposit of a receipt for purchase money, such receipt embodying the terms of the contract, will (assuming the conveyance has not been executed) create a valid charge. (*Vide* Mr. Bernard Campion's Lecture before the Institute of Bankers, as reported in their *Journal* for January, 1907.)

apparent.[a] Such a memorandum must be carefully drawn, however, as, by its terms, the conditions of the deposit will be strictly governed. An ordinary banker's memorandum of deposit will contain a declaration to the effect that the deeds referred to are lodged as a continuing security for the payment on demand of all sums now due or that henceforth may become due (including interest with half-yearly rests[b]—and this even if the account ceases to be an ordinary banking account—and all other usual banking charges), whether alone or jointly, on current account, or in any other manner whatsoever ; a further declaration that the depositor has not charged or incumbered the property in any way ; and an undertaking to execute a legal mortgage, with clauses usual in a banker's form of mortgage, when called upon.[c] There may also be included a specific charge on the proceeds to arise from any sales, with an undertaking to execute a mortgage which shall include the vendor's lien.[d]

It should be observed that the equitable mortgage created by deposit of title deeds, whether with or without

[a] " A memorandum should always be signed by the borrower . . . inasmuch as it furnishes clear evidence as to the nature, scope, and terms of the transaction." (*The Law of Banking*, by Heber Hart.)

[b] *Vide* footnote, p. 94.

[c] The execution of a legal mortgage can be enforced without an express undertaking.

[d] *Vide* footnote, p. 73.

If it is known the depositor has sold all or part of the property, the contract for sale should be deposited and notice of the banker's charge given.

Previous to the Act of 1881, an equitable mortgagee could pass the legal estate if in the mortgagor. He can still do so in the case of an equitable mortgage given before the passing of the Act. If given since, where the equitable mortgage is under seal, he can sell his equitable interest, and the mortgagor can be compelled to convey the legal estate to the purchaser. Sometimes the mortgagee by an equitable mortgage under seal is appointed attorney to convey the legal estate; but the mortgagor's death terminates the power. Another plan is for the mortgagor to declare a trust in respect of the legal estate, on behalf of the mortgagee, reserving power to the mortgagee to remove the mortgagor from the trust and appoint other trustees. (*Vide London and County Bank* v. *Goddard*, 1897.)

written memorandum of deposit, is something more than a mere *lien*, or right to retain possession of the deeds until repayment.[a] It constitutes an actual *charge* on the property, enforceable, on occasion, by foreclosure, or by sale under direction of the court. When it comes to a question of realising one's security, however, the advantages conferred by a *legal* mortgage are considerable. An equitable mortgagor may, conceivably, refuse to comply with his undertaking to execute a legal mortgage, necessitating proceedings in the courts with all the costs and worry thereby entailed (unless, indeed, he be made a bankrupt, when his trustee can be called on to pay off, or to assign the legal estate). In summing up the position, George Rae, in his *Country Banker*, speaks of "what the law, with playful irony, styles *an equitable mortgage*." There can be do doubt, however, in everyday banking practice, where advances are required temporarily, where the margin on the security is sufficient, and where the borrowers are otherwise good, that the advantages of this form of charge, on the whole, far outweigh the disadvantages. Good judgment must be exercised, of course ; and, at the first sign of weakness, the customer should be required to execute a legal mortgage in accordance with his undertaking.[b]

There is a legal maxim that "where the equities are equal the law prevails." The meaning of this is, if, in equity, two persons have equal interests, but one of them has also the legal estate (the law), the latter will be preferred. We have touched on the point in dealing with the subject of tacking.[c] It may be added here that if, say, a banker advance money against a deposit of title

[a] It has been held that a written promise to deposit particular title deeds by way of security constitutes an equitable mortgage. (*Fullerton* v. *Provincial Bank of Ireland*, 1903.)

[b] A mere memorandum of deposit under hand does not come on the title.

Paget says, in his *Law of Banking* : "The remedies on an equitable mortgage, though they may necessitate recourse to the court, are, through that medium, practically identical with those on a formal mortgage."

[c] *Vide* p. 92.

deeds, without notice, at the time, of any prior charge, no one can well have a better right than he to call for the legal estate ; and, unless he is negligent in his subsequent custody of the deeds, his position is well-nigh unassailable.[a] It is necessary, though, that the actual legal estate be in the customer at the time of the deposit. Otherwise, should the legal estate be subsequently acquired by the depositor,[b] it is just possible for him to borrow other moneys from another source, and in such a way as to convey the legal estate. If this second mortgagee acted in good faith, and without notice, he (the second mortgagee) might thus be entitled to precedence.

With regard to *trustees*, the general rule is, where an advance is made on trust property without notice of any trust, and the money is diverted, the beneficiaries are postponed *if a legal mortgage is given ;* but not so if the charge be only equitable.[c] The powers of trustees (as such) to mortgage, are generally governed by the terms of the particular trust. In the case of testators dying after 1897, under the provisions of the Land Transfer Act of that year, personal representatives are empowered, for the purpose of paying the debts, to sell or mortgage the real estate (as they were previously empowered to sell or mortgage the personalty), and also for the purpose of

[a] Lord Justice Stirling said in the case of *Taylor* v. *London and County Banking Co., Ltd.* (1901) *:* " A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a court of equity takes away nothing he has honestly acquired." But if he does not take the trouble to enquire for the deeds, he cannot be said to have honestly acquired the property. (*Vide* Sir John Paget's *Law of Banking ;* and Heber Hart's *Law of Banking.*)

[b] Thus a devisee has only an equitable estate in realty (since 1897) until the executor has assented. Or the legal estate may be outstanding in a trustee. Again, under a building agreement, a man takes only an equitable estate; the legal estate will follow in the form of a grant or lease. (*Note* the importance of giving notices to all parties when advancing on such an agreement; which is an unsatisfactory form of security at the best.)

[c] *Vide* Mr. Bernard Campion's Lecture before the Institute of Bankers, as reported in their *Journal* for February, 1907.

paying legacies charged on the realty.[a] (And refer to powers of trustees and executors to sell and mortgage under the Act of 1859.)[b]

An *incumbent* can charge to the extent of his own beneficial interest ; but not the benefice itself.[c]

It is generally considered safe to lend to an ordinary *trading company* against their deeds, even if express powers to borrow and mortgage may not have been taken by the company.[d] If borrowing and mortgaging are contemplated by a limited company, it is usual to include express powers in the *memorandum of association* (which is the company's charter). It would be dangerous to advance otherwise, unless the company were an ordinary trading one ; or unless the objects of its existence were such as naturally necessitated borrowing and mortgaging. It is important to see, too, how far the broad powers conferred by the memorandum may have been limited or regulated by the *articles of association.*[e] The question of borrowing powers is more fully dealt with by the writer in *Bankers' Advances.*

As regards *debenture issues* : if the debentures constitute only a *floating charge* on the landed property, and the deeds are not in the custody of the debenture-holders or of a nominee, it may be possible for the company to raise

[a] *Vide* p. 37. With regard to freeholds and leaseholds alike, now, the personal representatives can sell or mortgage and give a good title; unless the purchaser or mortgagee is saddled with notice that the transaction is not for administrative purposes. (*Vide* Emmet's *Notes on Perusing Titles.*)

In the case of leaseholds, one of two personal representatives can sell or mortgage, but not in the case of freeholds.

By section 12 of the Conveyancing Act of 1911, it is provided that the proving executor or executors may sell or mortgage freeholds, alone, notwithstanding that power may be reserved to others to prove.

[b] *Vide* footnote, p. 37.

[c] *Vide* Mr. Bernard Campion's Lecture before the Institute of Bankers, as reported in their *Journal* for February, 1907.

[d] It is well to require any mortgage or charge by a company or body corporate to be executed in pursuance of a special resolution.

[e] If an advance were originally *ultra vires*, as being outside borrowing powers, such advance may not be secured by the exercise of borrowing powers taken subsequently.

money, elsewhere, on the security of the deeds. There is less risk if the debentures are framed as a *specific charge* on the landed property already belonging to the company, and as a *floating charge* on the rest of the assets, present and future ; especially if the deeds be held by a nominee of the debenture-holders, and if there be a renouncement of any right to mortgage in priority or *pari passu*. And, of course, all risk can be wholly obviated by vesting in trustees on behalf of the debenture-holders.[a] For fuller information on the subject see the writer's *Bankers' Advances*.

The provisions of the Building Societies Acts, 1874 and 1894, limit the borrowing powers of *societies* incorporated and registered under the former Act as follows, viz. :— (1) In a permanent building society, the amount outstanding on loan must not at any time exceed two-thirds of the amount of the members' mortgages to the society. (2) In a terminating building society, the amount oustanding on loan may either be a sum not exceeding two-thirds, as above, or a sum not exceeding a year's subscriptions on the members' shares for the time being in force. (3) In calculating, as above, amounts secured on properties, the payments on which were a year in arrear at the date of the society's last account, and amounts secured on properties of which the society had then been a year in possession, are to be disregarded. All sums secured by the mortgages, whatever their nature, including instalments not yet accrued due, may be taken into account, however.

Unless incorporated or registered under the Act of 1874,

[a] Ordinary mortgages on properties had not to be registered with the Registrar of Joint Stock Companies under the Companies Act of 1900. But this was altered under the Act of 1907 so far as regards mortgages given after 1st July, 1908. (Of course, it is incumbent upon companies to record all mortgages on their own registers of mortgages.)

The Act of 1907 settles a point that was long in doubt with regard to non-terminable debentures. The Act makes it, without doubt, legal for debentures to be irredeemable; or practically so; though the power must be incorporated in the articles of association as well as in the memorandum. (*Vide* p. 82.)

a *building society* has no borrowing powers, except so far as expressly authorised by the rules. Even if so incorporated or registered, it is necessary for the rules to show the society's intention to avail itself of such powers.

It is unsafe to advance to a building society that has no borrowing powers ; and if a society has such powers it is necessary to ascertain that these are not exceeded. A banker, for this reason, prefers that all advances made to a building society (or, indeed, to any other society or corporation whose borrowing powers are limited) shall be on a separate dead loan account. If made on a current account, although within the borrowing powers in the first instance, inasmuch as the advance would constantly be undergoing the process of recreation, at the finish it may turn out to be outside the borrowing powers.

Again, borrowing powers do not necessarily imply mortgaging or pledging powers. It is necessary, therefore, in making an advance to a building society, to be satisfied that its rules clearly give the necessary powers to mortgage or pledge, and in a manner requisite to the occasion. Otherwise, it may be, that the person advancing may have to rank, on liquidation, as an unsecured creditor. The question of loans to building societies will be found more fully dealt with in *Bankers' Advances* by the present writer.

Urban Authorities, under the provisions of the Public Health Act of 1875, have, as with the sanction of the Ministry of Health, general borrowing powers up to double the assessable value. They often acquire larger powers, however, under special Acts of Parliament. The reader is referred to *Bankers' Advances* on the subject of borrowings by Local Authorities.

It is necessary for all *partners* to join in a legal mortgage over the firm's landed property ; but an equitable mortgage may, conceivably, be created by one partner alone.[a]

[a] *Vide* Mr. Bernard Campion's Lecture before the Institute of Bankers, as reported in their *Journal* for February, 1907; and *vide*, *Bankers' Advances.*

As regards *market garden* and *agricultural land* it should be borne in mind that, under the provisions, respectively of the Market Gardeners Compensation Act, 1895, and the Agricultural Holdings Act, 1908, tenants, on going out, can claim heavy compensation against mortgagees in possession.

CHAPTER XI

REGISTRATION OF LAND

THE aim of the Land Transfer Act of 1875, as amended by that of 1897, is the registration of land, with the view of substituting for ordinary title deeds the evidence of the Register; such evidence being expressed by a land certificate, constituting, in its highest form, a sole document of title. We will endeavour to ascertain to what extent the application of the Acts secures, or tends towards securing, clearness and simplification of transfer, combined with certainty of title and tenure.

Under the provisions of the statutes valid ownership may be transferred from one person to another by the mere act of registration; and, by reason of this fact, investigation of title by a purchaser of registered land may be rendered unnecessary. "One of the objects of the Land Transfer Acts," says Elphinstone,[a] "is to avoid the necessity of furnishing and verifying the abstract, and to substitute simple inspection of a register for elaborate investigation of title."

In an ordinary way, a person in possession of land is presumed in law to be the owner thereof. If another be entitled it is for that other to prove his case.[b] "The plaintiff," continues Elphinstone, "in an action to recover the possession of land, must recover by the strength of his own, not by the weakness of the defendant's title." Where, however, land is registered under these Acts, it is presumed that the ownership is in the person so registered. The onus of proof will lie with a person in adverse possession.

Registration under the Acts is permissive. But the sovereign may, by Order in Council, declare that, in any particular area (as defined in the Act of 1897), registration of title to freehold land, and also of title to leasehold land where the lease or underlease has at least 40 years to run,

[a] *Vide* Elphinstone's *Introduction to Conveyancing*.
[b] *Vide* p. 66.

shall be *compulsory on sale;* so that, failing such registration, the legal estate would not pass.[a] Between 1st January, 1899, and 1st July, 1902, registration, accordingly, became compulsory over the whole of the County and City of London.

It becomes necessary, at this stage, to inquire more closely into the general scope and working of the Acts.

Under the Acts, a Land Registry Office has been established in London. Provisions are made for the establishment, also, of local registries; though the demand for registration outside London has not yet justified the establishment of any such.

As regards the Register itself, this is comprised of three parts. (1) The Property Register; containing a brief description of the land, with a reference to the general map or to a filed plan.[b] (2) The Proprietorship Register; giving name and address of the proprietor, and a statement as to nature of title (see later). (3) The Charges Register; with particulars of incumbrances (mortgages, charges, leases, fee farm rents, etc., as to which see later).[c] All registered descriptions of land are based on the ordnance map; and index maps are kept showing the area and position of registered properties.[d] The Register is private. It is open only to the registered proprietor or his solicitor (or under their written authority).

Application may be made to the Land Registry Office for the registration of any freehold land, and also of any leasehold land[e] where the lease is determinable on a life or on lives, or has 21 years to run; and whether the land

[a] "Does not appear in the case of a sale to prevent the equitable estate in the lands sold from passing to the purchaser." (Williams on *Real Property*.)

[b] The title to each registered property bears a distinguishing number.

[c] Incumbrances may, if the Registrar thinks fit, be entered in a separate book referred to in the Charges Register.

[d] Where the position and extent of a registered property are shown in the General Map and Parcels Book, it shall not be necessary to show them in the Index Maps. (Rule 12.)

[e] But not terms created for mortgage purposes. (*Vide* p. 89.)

be subject to incumbrances or not. Copyholds are exempt. So are customary freeholds,[a] if the concurrence of the lord of the manor be requisite for the perfection of title. Undivided shares may be registered. So may incorporeal hereditaments. The Acts do not extend to Scotland or Ireland.

In the case of a person contracting to purchase for his own benefit, it is required that the vendor shall be a consenting party to the application for registration. But, if a third person be already entitled to the land, in law or in equity, for his own benefit, or if he be capable of disposing thereof for his own benefit, he may register at any time. It is not necessary for the applicant to have the legal estate. By the act of registration, " the estates of those previously seised, or entitled at law, appear to be extinguished."[b]

Certain interests, such as reversionary and life interests (except leases for lives), interests, that is, that are carved out of the fee simple or out of the term of years, have to be dealt with off the Register, " which affords little or no assistance in such cases " ;[c] though any person interested can enter up on the Proprietorship Register notices, cautions, inhibitions, or other restrictions, as provided by the Acts (see later).

Again, the Registrar will take no cognizance of trusts ; though it is open to beneficiaries to take measures to protect their interests in a similar way. Of course, *as between trustees and beneficiaries*, the law remains as it was before. But it is possible for a fraudulent trustee to dispose of

[a] *Vide* p. 65.

[b] " But the incumbrancer whose rights are preserved does not lose the legal estate if it is vested in him." (Elphinstone's *Introduction to Conveyancing*.)

[c] *Vide* Lecture by Mr. B. L. Cherry before the Institute of Bankers, as reported in their *Journal* for March, 1899.

" The question as to what deeds can and what deeds cannot be put on the Register is a very difficult one to answer. . . . To meet the difficulty, solicitors prepare two deeds: one to meet the requirements of the transaction, and the other to satisfy the Registrar. The duplication of documents is recognized by everybody as absurd." (J. S. Rubinstein on " The Land Transfer Scandal.")

registered land if the precautions indicated above have not been adopted.[a]

A trustee, with power of sale, may register, as with the consent of any person whose concurrence is requisite to the exercise of such power of sale. So a tenant for life under the Settled Land Acts (or, at the option of the tenant for life, the trustees) can register ; but restrictions should be entered up for the protection of the estates and rights of beneficiaries. In such a case the actual fee simple does not appear to be acquired by the life tenant ; but at the same time there is specially reserved to him the power of disposing of the whole estate.

A person dealing, for value, with registered land, in any statutory manner, is entitled to rely on the correctness of the Register ; and he may claim full compensation out of a guarantee fund, provided under the Acts in this connection, for any loss he may sustain, by reason of the title he has relied on falling short of what, on the face of it, it purported to be.

An application for the registration of land may be for *absolute* title, or for *possessory* title only. In the case of a leasehold, for *absolute* title, for *good leasehold* title, or for *possessory* title.

If for *absolute* title, before registration the title has to be approved by the Registrar ; and it therefore undergoes a very complete examination. The application is usually[b] advertised and any objections are heard. But, when once granted, the owner is supposed to acquire an absolute and indefeasible right to the property against all the world ;[c]

[a] *Vide* p. 115. And *vide* Brickdale and Sheldon on the Land Transfer Acts.

[b] For exceptions, *vide* Rule 30.

[c] It appears that the person who first comes on the Register with an *absolute* title is not entitled to any guarantee. On the other hand, he is always liable for any flaw in his title. A subsequent registered owner has the benefit of the State guarantee, if he is deprived of the property or adversely affected by reason of such flaw; but the State has recourse against the first registered owner. This, in a great measure, explains why absolute title is so seldom applied for. (*Vide* J. S. Rubinstein on "The Land Transfer Scandal.")

subject, however, to the registered incumbrances.[a] At the same time, the more recent title deeds are marked, so that the fact of registration may not be suppressed.

Where, upon an application for an absolute title, the Registrar does not feel justified in granting such a one without qualification on some point or other, a *qualified* title may be granted accordingly. The title will be absolute except so far as regards the particular reservation; which will be described in the Proprietorship Register. For example, the Registrar may not feel justified in passing the title for more than a certain number of years.

As regards *good leasehold* title, Rule 53 provides that "no person shall be registered as proprietor of leasehold land with good leasehold title until and unless the title to the leasehold interest is approved by the Registrar." (For an absolute title, both the leasehold and freehold interests must be approved; and also any intermediate leasehold interest). And Rule 54 provides that "where the original lessee is registered as first proprietor, the title may be entered as a good leasehold title on his satisfying the Registrar that he has not incumbered or dealt with the land in any way except as disclosed, and no advertisement shall be necessary."[b]

Possessory title is a different thing altogether. It is based merely on possession. There is no investigation

[a] "Subject, too (unless otherwise recorded on the Property Register under the provisions of the Acts), to certain minor liabilities, rights, and interests, which the Acts deem not to be incumbrances under the Acts; such as quit rents, land tax, death duties, rights of common, and leases with less than twenty-one years to run. These *may* be noted in the Property Register at the discretion of the Registrar. (Disclosed rights to mines and minerals *must* be noted.)

And subject, too, *as between trustees and beneficiaries*, to unregistered estates or interests of such beneficiaries. (*Vide* p. 105.)

[b] "This title is always misleading, as it does not in any way take account of the lessor's right to grant the lease; and a person may have a *good leasehold* title to a lease that may subsequently turn out to be invalid. Needless to say, he is not guaranteed against this—the really serious liability." (J. S. Rubinstein on "The Land Transfer Scandal.")

of title, *primâ facie* evidence alone being accepted. Thus, it is sufficient to produce the last conveyance on sale (with, in the case of a leasehold, the lease, if in the owner's possession ; and, if not, a copy) ; or, failing the last conveyance, a statutory declaration of title, according to the particular estate claimed, may be admissible.

At the discretion of the Registrar, documents of title are required to be marked in order to obviate concealment of the registration.[a]

The effect of registration with possessory title is only to guarantee subsequent dealings ; the guarantee is not retrospective. It follows that, on acquiring land registered with a possessory title only, it is necessary for the title to be investigated in the ordinary way up to the point of registration. From that point the Register will be the evidence of title.

In practice, it is seldom that absolute title is applied for. This is more particularly noticeable in London, where registration on sale is compulsory. The compulsion does not extend beyond registration with possessory title.

It is contended by the advocates of the system that, in course of time, a possessory title practically develops into an absolute title. Even if this were so, during the transition stage, there must necessarily be two conflicting systems

[a] " If, on an application for registration with a possessory title, the Registrar observes that the documents produced are sufficient to enable registration to be made with absolute title, he may, after completing the registration with possessory title, inform the applicant that he proposes (subject to such conditions, if any, as may be required) to convert the title into an absolute title, and may, if the applicant does not object, convert the title into absolute accordingly." (Rule 39.)

" If the Registrar is of opinion that an absolute title may be registered at the expiration of a certain period or on the occurrence of a particular event, he may (unless the applicant upon notice objects) enter a note of the fact; and, on the expiration of that period, or on proof to his satisfaction of the occurrence of the event, he may, if he think fit, register the title as absolute accordingly. In the meantime the title shall be registered in the then proper manner." (Rule 42.)

concurrently in play, entailing so much additional trouble and expense.[a]

Under Rule 27, absolute title can now be granted after land has been on the Register for six years with possessory title " on mere proof that the original registered proprietor was a *bonâ fide* purchaser on sale, and that he made proper examination of title under competent legal advice on the occasion."[b]

As pointed out by Mr. Brickdale,[b] the Registrar of the Land Registry, in the case of a lease registered with possessory title before it has changed hands, inasmuch as the lease has to be produced,[c] the registration is practically absolute from the commencement. (When an absolute title to a leasehold is applied for, however, it is necessary, as we have seen, for the Registrar to approve of the freehold title, as well as of the leasehold, and of any intermediate leasehold.)

On completion of the registration of the land, whether freehold or leasehold, the Registrar is required to prepare a *land certificate*,[d] certifying that the individual is registered as proprietor, and stating whether with an absolute,

[a] " The arguments put forward by the officials that, as a purchase deed becomes in time a good root of title, the certificate of registration of the same deed will become in time a good root, has no foundation in fact. . . . The purchase deed would show that the property was bought subject to a mortgage or lease, but neither one nor the other would appear on the Register, and consequently not on the certificate." (J. S. Rubinstein on " The Land Transfer Scandal.")

" It is not too much to say that, up to the present time, the fact of compulsory registration with possessory title in London has been to place the purchaser there at a disadvantage as compared with the purchaser elsewhere." (The Land Transfer Commissioners' Report, issued in 1911.)

[b] *Vide* Mr. Brickdale's Lecture before the Institute of Bankers, on " The Practice of the Land Registry as affecting Bankers "; as reported in their *Journal* for February, 1905.

[c] *Vide* p. 108.

[d] " It includes a short verbal description of the property, a plan of it made from the ordnance map, the name and address of the proprietor, a statement of the value given on the last dealing, and the charges, leases, and other burdens affecting it. There may also be cautions or restrictions." (Mr. Brickdale's Lecture as before.)

qualified, good leasehold, or possessory title. This certificate (which *may* be left in the Registry) is said to be the only document of title to registered land. As we shall see,[a] a deposit of the certificate is sufficient to create a lien on the property; but inasmuch as, where the title is possessory only, it may, as we have noticed, be necessary to investigate the prior title, the title deeds themselves, should, in such case, be deposited with the certificate.

Every registered proprietor may transfer in whole or in part; or may charge[b] the registered land; such transfer or charge to be under seal, and in the prescribed forms; and to be entered up on the Register.

Form of instrument of transfer of land under the Land Transfer Rules.

District ——.
Parish ——.
No. of title ——.
(Date.) In consideration of —— pounds. I, A B, of ——, hereby transfer to C D, of ——, the land comprised in the title above referred to. (If leasehold, "for the residue of the term granted by the registered lease.")
Signed, sealed and delivered
by the above-named, etc.
(NOTE.—Provision is made for brief adaptations.)

Form of instrument of charge of land under the Land Transfer Rules.

District ——.
Parish ——.
No. of title ——.
(Date.) In consideration of —— pounds. I, A B, of ——, hereby charge the land comprised in the title above

[a] *Vide* p. 114.
[b] For a principal sum, or an annuity or other periodical payment.

referred to with the payment to C D, of ——, on the —— day of ——, of the principal sum of —— pounds, with interest at —— per cent. per annum, payable half-yearly (*or* quarterly) on the, etc., in every year.

Signed, sealed and delivered
by the above-named, etc.

(NOTE.—Provision is made for brief adaptations.)

" Where a person, having the right to apply for registration as first proprietor of land, desires to transfer or charge the land before he is himself registered as proprietor, he may do so in the manner and subject to the conditions which would be applicable if he were in fact the registered proprietor. A charge shall not be accepted for registration until an application has been made for the registration of the land to which it relates." (Rule 96.)

If the land be not already registered, then instead of the words " the title referred to " (in the forms of transfer and charge), a reference to the last preceding documents of title containing a description of the land must be inserted.

First, as regards registered *transfer*.

If for valuable consideration, a purchaser acquires, by a registered transfer, a good title (according to the particular title registered), subject to registered charges and interests, but freed from all registrable charges and interests that have not been registered. *If without valuable consideration*, so far as the transferee is concerned, he takes subject to any such unregistered estates, rights, interests or equities ; but such transferee can, himself, subsequently dispose of or charge the property by registered dealings freed from any such unregistered fetters. It should be carefully borne in mind, though, that in the case of a possessory title prior incumbrances are not registrable.

It appears that the power to transfer given by the Acts does not extend to the creation of leases, or of easements (except, perhaps, for mining purposes).[a] In other words,

[a] It does extend to transfer in consideration of rent charge.

the statutory effect of transfer, in such cases, does not arise; and it follows that such assurances have to be granted off the Register (and entered up as incumbrances). But, as we have seen, leaseholds (except short terms) become registrable as separate holdings; and an easement, if an hereditament, may be similarly registered; as also may rights to mines or minerals when such rights are severed from the land.

The land certificate (if not left in the Registry) has to be produced whenever there is a change of ownership in the land; and a note of such change officially indorsed. If part only of the land be dealt with, a new certificate is prepared for the transferee.

It is claimed that the land certificate is very difficult to forge. And there exists, of course, the constant liability to exposure of forgery by means of reference to the Register.

Secondly, as regards registered *charge*.

A registered charge conveys only a legal charge or interest, and not the actual legal estate. "The Acts contain no provision for enabling the registered proprietor as such, to mortgage the land by way of conveyance, subject to a proviso for redemption."[a]

In a registered charge there is implied (unless it be otherwise recorded) a covenant to repay principal with interest (and, in the case of a leasehold, a covenant to pay the rent and perform the covenants). Powers of entry, foreclosure and sale, are also implied.[b]

On completion of a registered charge, the Registrar is required to prepare a *certificate of charge*. Unless there is a stipulation to the contrary, the chargee is not entitled

[a] Lecture by Mr. B. L. Cherry before the Institute of Bankers as reported in their *Journal* for March, 1899.

[b] *Vide* Chapter X.

It *does not appear* to be necessary for an intending chargee to make any searches outside the Register except as to matters notified on the Register (subject, however, to what has been said *re* qualified, possessory, and good leasehold titles). (*Vide* the same address by Mr. Cherry.) There is some doubt, however. (*Vide* p. 113.)

to the custody of the land certificate ;[a] although this has to be produced and officially indorsed. Should the chargee be driven to sell, it is only necessary for him to produce at the Registry the certificate of charge ; and he will be able to convey the entire estate. The registered chargee may also transfer (on a prescribed form) to another person, the certificate of charge being produced at the same time and officially indorsed. A registered *sub-charge* can be effected similarly, and certificate of sub-charge will be granted.

The difficulties with regard to a registered charge are well expressed by Elphinstone,[b] thus :—

(1) " That it is by no means clear whether the charge may not be affected by certain unregistered rights from which a registered transfer would be free.

(2) " That the registered proprietor of the charge does not acquire the legal estate. This gives rise to doubts as to the right of the registered proprietor of the charge to sue on the covenants or to enforce the power of re-entry contained in certain leases of the land.

(3) " Where the proprietor of the registered charge goes into possession of the land, no length of time will give him the title to the fee ; but, where he would have acquired a title by possession of the land were it not registered, he may apply for rectification of the Register." [c]

It is possible to modify the form of registered charge, so as to pass the legal estate to the chargee. Or, a mortgage in the ordinary form may be executed off the Register, and an inhibition or caution lodged (or, with the addition of a registered charge). Or, again, the mortgage off the

[a] It would be unsafe for a banker to make advances on running account without holding the land certificate.

[b] *Introduction to Conveyancing.*

" It would seem, on the whole, that the Land Transfer Acts, which were intended to simplify conveyancing, have only succeeded in making it (so far as mortgages are concerned) more elaborate and technical than ever." (Fisher's *Law of Mortgage.*)

[c] He would be saddled with burden of proof, and would have to pay the costs of the application. (*Vide* Williams on *Real Property.*)

Register may be by way of demise, protected by a registered charge ; notice being entered up of the lease so created ; and the certificate indorsed. In the opinion of several authorities,[a] however, the only plan which meets all the above objections is to register under the prescribed instrument of transfer, taking a mortgage off the Register at the same time. (In the case of a leasehold it may be better to take a registered charge, to avoid liability on the covenants ; and this should be supported by an under-lease, to afford the chargee the right, as under-lessee, to seek relief, on occasion, against forfeiture.)[b]

We have noticed before that a charge can be created by deposit of the land certificate.[c]

The last paragraph of section 8 of the Act of 1897 reads :—

" The registered proprietor of any freehold or leasehold land, or of a charge, may, subject to any registered estates, charges, or rights, create a lien on[d] the land, or charge, by deposit of the land certificate, or office copy of registered lease, or certificate of charge ; and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title deeds or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage."

As Mr. Brickdale points out,[e] such a deposit affords the creditor better security[f] than, under conceivable circumstances, is given by a deposit of title deeds, with memorandum of deposit. (For instance, where there is a concealed settlement ; or a prior mortgage, and the mortgagee has

[a] *Vide* Williams on *Real Property ;* Elphinstone's *Introduction to Conveyancing ;* Lecture by Mr. B. L. Cherry before the Institute of Bankers, as reported in their *Journal* for March, 1899, etc.

[b] *Vide* p. 56. [c] *Vide* p. 110.

[d] " The deposit of title deeds by an owner in fee simple constitutes an equitable mortgage or charge, and this is what the Act must be interpreted to mean." (Sir John Paget's *Law of Banking.*)

[e] *Vide* Lecture before the Institute of Bankers, as reported in their *Journal* for February, 1905. [f] Especially if title is *absolute.*

not been guilty of negligence.) So, there is no danger of a portion of the land having been sold, without indorsement, as *is* the case with title deeds. And so, as regards trustees. As we have seen,[a] the Registry takes no cognizance of trusts; and, in the absence of any registered caution or other restriction, a banker or other lender may treat trustees as actual beneficial owners, as well in the case of a charge by deposit as in that of a registered disposition.[b]

The certificate, in the case of mere deposit, has not to be noted or produced at the Registry. It may be verified by search,[c] and notice may be given. Such notice will act as a *caution*, entitling the creditor to 14 days' notice on any attempted registration in respect of which the production of the certificate may be necessary.

It sometimes happens that a person may have arranged to lend money for the completion of a purchase. It is not practicable for him to hold the certificate at the time. Provision is made, however, for a binding notice of intended deposit, in such case; and the certificate, when ready, will be delivered to the lender. (Similarly, on an application for a loan after transfer has been executed, but before registration; or during registration.)

Provision is made, too, by the Rules, for the registration of the proper representatives on the death of a sole proprietor, or of a surviving proprietor. Also, for the registration of a trustee in bankruptcy.

Notices can be given of estates in dower and by curtesy; and these will be entered up as incumbrances.

If land is situate in a district where registration is not compulsory it may be removed from the Register as with

[a] *Vide* p. 105. [b] *Vide* p. 98.

[c] The search should be from the date when the certificate was last noted up; as, in the case of notices by adverse claimants, the certificate has not to be produced. The exceptions extend to cautions, inhibitions, notices of leases and of deposit. When the certificate is brought to be noted up, presumably these are all entered thereon. (*Vide* Lecture by Mr. B. L. Cherry before the Institute of Bankers, as reported in their *Journal* for March, 1899.)

the concurrence of all interested parties ; the certificate being given up.

Some disadvantages of the present system of official registration of title in this country have been indicated above. Whether the advantages outweigh the disadvantages is at least doubtful. Under the Act of 1881 ordinary conveyancing became a much simpler and more satisfactory business than it formerly was ; and there are not wanting disinterested authorities of high repute who would like to see the whole system of official registration of title swept away. Signs, however, point to a further tinkering with the system by additional legislation, in the hope of making it more workable and acceptable ; and it is even suggested that powers may be taken to extend, arbitrarily, the principle of compulsory registration throughout England. It seems almost too much to expect that the system will now go entirely by the board, as, apparently, is to happen with regard to those variegated, bewildering, and vexatious valuations and taxes,[a] the introduction of which caused so much political ferment, and, incidentally, called into existence so considerable a bureaucracy, some years since.

Before concluding, it is proposed to make a short inquiry into the working of the Middlesex and Yorkshire Registries.

It must be clearly understood, at once, that there is a very great distinction between registration of title under the Land Transfer Acts and mere registration of deeds (spoken of as *memorials of deeds*) under local registries. The ordinary system of title is not affected by the Local Registration Statutes ; the evidence of title is still constituted by the usual chain of deeds and events ; the object of the statutes being, merely, the prevention, so far as possible, of fraud and error by concealment of dealings or misplacement of deeds.

When land is registered under the Land Transfer Acts, it becomes exempt from the jurisdiction of the local

[a] As embodied in the Finance Act of 1910. (*Vide* p. 123.)

Registries unless, and until, it be removed from the Land Registry.[a] But land in the County of London, where registration on sale is compulsory, can never be taken off the Register after it has once gone on.

Middlesex land, outside the County of London, is still subject to the old Middlesex Registries jurisdiction; though, under the Land Transfer Acts, the Land Registry has now become the place of registration in respect of such land. Where land is so situated, conveyances should always be registered. So, strictly speaking, should mortgages and memoranda of deposit. If the mortgage is merely an equitable one by deposit, without writing, there is nothing to be done.[b]

Under the statutes, registration is necessary to priority. But, with regard to Middlesex, equity has settled that priority may not be gained by a subsequent mortgagee or purchaser, if he can be saddled with, even, *constructive* notice (for instance, if the deeds were not forthcoming, the fact should have *put him on inquiry*).

Again (still as regards Middlesex), unless a mortgagee is otherwise notified of the existence of other charges, it is not incumbent on him to search the Register. "Registration is not *per se* notice."[c] He is, therefore, so far, entitled to make further advances and to tack, notwithstanding any intermediate charge on the Register.

As regards Yorkshire, the position is quite different. There the same doctrine of equity does not prevail, since, by the Yorkshire Registries Act of 1884, section 14, it is enacted that "all assurances entitled to be registered under the Act (and the Act provides that any assurance may be registered), shall have priority according to the date of the registration thereof, and not according to the date of such assurances;" and further that "all priorities

[a] *Vide* p. 115.

[b] *Vide* Lecture by Mr. Bernard Campion upon "Bankers' Advances upon Title Deeds," before the Institute of Bankers, as reported in their *Journal* for January, 1907.

[c] *Vide* the same, as reported in their *Journal* for May, 1907.

given by this Act shall have full effect in all courts, except in cases of fraud ; and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities ; and no such person shall lose any such priority merely in consequence of his having been affected by actual or constructive notice, except in cases of actual fraud,[a] etc."

Another section (7) provides that bare deposit of deeds without memorandum, and even claims in respect of unpaid purchase money, are registrable interests, and as such are liable to lose priority if not registered.

And under yet another section (16) the right of tacking is expressly abolished, should an intervening charge appear on the Register.

It would appear, therefore, that registration in Yorkshire is a rather important matter. Strictly speaking, a banker should give notice of even any mere deposit of deeds of Yorkshire property by way of security. And, even so, it might be desirable to require advances to be taken on dead loan accounts. No doubt the exigencies of some cases demand that a banker should refrain from giving notice. The risk incurred is not really very great when dealing with customers in good repute ; and in any case the occasions on which a person can find it possible to raise money on his property without production of the deeds are not very frequent.

[a] Stirling, J., laid down, in *Batteson* v. *Hobbs*, 1896, that what is meant is " fraud importing grave moral blame; not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a court of law or a court of equity."

APPENDIX

STAMP DUTIES; DEATH DUTIES; AND FIRE INSURANCE

STAMPS.

On purchase deeds of property.

	£	s.	d.
Where the amount or value of the consideration for the sale does not exceed £5		–	6
Exceeds £5, and does not exceed £10 . . .		1	–
,, £10 ,, ,, £15 . . .		1	6
,, £15 ,, ,, £20 . . .		2	–
,, £20 ,, ,, £25 . . .		2	6
,, £25 ,, ,, £50 . . .		5	–
,, £50 ,, ,, £75 . . .		7	6
,, £75 ,, ,, £100 . . .		10	–
,, £100 ,, ,, £125 . . .		12	6
,, £125 ,, ,, £150 . . .		15	–
,, £150 ,, ,, £175 . . .		17	6
,, £175 ,, ,, £200 . . .	1	–	–
,, £200 ,, ,, £225 . . .	1	2	6
,, £225 ,, ,, £250 . . .	1	5	–
,, £250 ,, ,, £275 . . .	1	7	6
,, £275 ,, ,, £300 . . .	1	10	–
,, £300. For every £50 and also for any fractional part of £50, of such amount or value . .		5	–

The above is the original scale under the Stamp Act of 1891. Under the Finance Act of 1910 the scale is *doubled;* except in the case of "a conveyance or transfer when the consideration does not exceed £500, and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500."

Under the Act of 1891, a stamp of 10s. was imposed where the consideration was *nominal.* But now, under the Finance Act of 1910, any conveyance or transfer operating as a voluntary disposition *inter vivos* is liable

to the same duty as a conveyance on sale (on the value as adjudicated by the Commissioners), unless it be a settlement in consideration of marriage. It has been held that a declaration of trust is comprehended by the words "conveyance or transfer."

The amount of the valuation of fixtures or growing timber, which pass by a conveyance without mention, must be included in the consideration liable to stamp duty.

The Stamp Act provides that "where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically, for a definite period exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of the consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument."[a]

On leases.

—	If the term is definite and does not exceed 35 years, or is indefinite.	If the term being definite, exceeds 35 years, but does not exceed 100 years.	If the term being definite, exceeds 100 years.
	s. *d.*	£ *s.* *d.*	£ *s.* *d.*
Not exceeding £5	– 6	3 –	6 –
Exceeding £5, but not exceeding £10	1 –	6 –	12 –
,, £10 ,, ,, £15	1 6	9 –	18 –
,, £15 ,, ,, £20	2 –	12 –	1 4 –
,, £20 ,, ,, £25	2 6	15 –	1 10 –
,, £25 ,, ,, £50	5 –	1 10 –	3 – –
,, £50 ,, ,, £75	7 6	2 5 –	4 10 –
,, £75 ,, ,, £100	10 –	3 – –	6 – –
,, £100 for every £50, or fractional part of £50	5 –	1 10 –	3 – –

[a] For fuller information *re* Stamp Duties, *vide* Alpe's *Law of Stamp Duties*.

(In respect of any sum paid down, in addition, by way of a premium, stamp duty thereon additionally, at the same rate as on a purchase deed).

The above is the original scale under the Stamp Act of 1891. It is now *doubled*, under the Finance Act of 1910. (And, as regards premiums on leases, the duty is *double* that payable on purchase deeds under the 1891 Act).

The following are exceptions, viz. :—

Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of £10 a year, for any definite term not exceeding a year, 1d.

And, for any definite period less than a year, of any furnished dwelling-house or apartments where the rent for such term exceeds £25, 5s.

An agreement for a lease for any term not exceeding thirty-five years, is chargeable as though it were a lease. A lease, made in pursuance of such an agreement duly stamped, is to be charged with a duty of 6d. only.

Denoting stamp.

Where the duty with which an instrument (other than a duplicate) is chargeable depends in any manner upon the duty paid upon another instrument, the payment of such last-mentioned duty will, on production at the office of the Solicitor of Inland Revenue, Somerset House, of both instruments, be denoted upon such first-mentioned instrument.

On the duplicate or counterpart of any instrument chargeable with any duty.

Where such duty does not amount to 5s., the same duty as the original instrument. In any other case, 5s.

A duplicate or counterpart of any instrument as aforesaid (except the counterpart of a lease, not being executed by any lessor, etc.) is not to be deemed duly stamped unless it appears by some stamp impressed thereon that the full duty has been paid upon the original instrument.

Increment Value Duty.

The Finance Act of 1910 provides as follows :—

" Subject to the provisions of this part of the Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the thirtieth day of April, 1909."

With certain exemptions and deductions the duty arises on the occasion of any transfer on sale of the fee simple or of any interest in the land ; or on the grant of any lease of any land (other than for a term not exceeding 14 years) ; also, under certain circumstances, on the occasion of property passing on a death ; as well as on certain periodical occasions when property is held by corporate or incorporate bodies.

Any instrument is not to be deemed fully stamped for the purposes of the Stamp Act of 1891, unless it is stamped :

(*a*) either with a stamp denoting that the increment value duty has been assessed by the Commissioners and paid in accordance with the assessment ; or

(*b*) with a stamp denoting that all particulars have been delivered to the Commissioners, which, in their opinion, are necessary for the purpose of enabling them to assess the duty, and that security has been given for the payment of duty in any case where the Commissioners have required security ; or

(*c*) with a stamp denoting that upon the occasion in question no increment value duty was payable.

Reversion Duty.

The Finance Act of 1910 provides as follows :—

(Subject to certain exemptions and allowances) " on the determination of any lease of land there shall be charged, levied, and paid, ... on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

Undeveloped Land Duty.

The Finance Act of 1910 provides as follows :—

(Subject to certain exemptions and allowances) " there shall be charged, levied and paid for the financial year ending the thirty-first day of March, 1910, and every subsequent financial year, in respect of the site value of undeveloped land a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value."

Mineral Rights Duty.

The Finance Act of 1910 provides as follows :—

(Subject to deductions in certain cases) " there shall be charged, levied, and paid for the financial year ending the thirty-first day of March, 1910, and every subsequent financial year, on the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in the Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value."

Of the Land Values Duties imposed by the Finance Act of 1910 the Undeveloped Land Duty is wholly suspended, and others partially so. It seems probable they will all shortly be discontinued.

On a mortgage.

(1) Being the only or principal security (other than an equitable mortgage, as to which see below) for the payment or repayment of money,

				£	s.	d.
Not exceeding			£10 . . .		–	
Exceeding	£10	and not exceeding	£25 . . .		–	8
,,	£25	,, ,,	£50 . . .		1	3
,,	£50	,, ,,	£100 . . .		2	6
,,	£100	,, ,,	£150 . . .		3	9
,,	£150	,, ,,	£200 . . .		5	–
,,	£200	,, ,,	£250 . . .		6	3
,,	£250	,, ,,	£300 . . .		7	6
,,	£300 for every £100 and also for any fractional part of £100 of such amount . . .				2	6

(2) Being a collateral, or additional, or substituted security (other than an equitable mortgage, as to which see below), or by way of further assurance, where the principal or primary security is duly stamped (as above), for every £100, and also for any fractional part of £100 of the amount secured, 6d. With a maximum of 10s.

On a transfer of mortgage.[a]

For every £100, and also for any fractional part of £100 of the amount transferred, exclusive of interest which is not in arrear, 6d.

On a re-conveyance.

For every £100, and also for any fractional part of £100 of the total amount at any time secured, 6d. With a maximum, in the case of a collateral security (provided that the re-conveyance of the primary security has been duly stamped), of 10s.

The re-conveyance, or vacation,[b] by a building society, endorsed on a mortgage, is exempt from stamp duty.

On an equitable mortgage.

For every £100, and any fractional part of £100 of the amount secured, 1s.

For the purposes of the Stamp Acts, the term *equitable mortgage* has a restricted meaning.[c] It is an agreement or memorandum *under hand only*. Thus, a second mortgage under seal must be stamped as a mortgage. Moreover, any agreement or memorandum under hand only, if it includes a power of sale, or gives to the lender the powers conferred by the Conveyancing Acts, is also liable to stamp duty as a mortgage.

The duty payable on an equitable mortgage is the same whether it be a principal or primary security, or a collateral security.

[a] A voluntary gift of moneys secured on mortgage, effected by transfer, requires to be stamped on the value of the property, and not as a transfer.

[b] *Vide* footnote, p. 86. [c] *Vide* p. 92.

As has been said,[a] bankers' forms of mortgage and memorandum of deposit are usually framed as continuing securities, to cover all sums due or to become due. It is possible expressly to limit the amounts recoverable thereunder; and, on the Inland Revenue authorities being satisfied they are so limited, such instruments are chargeable for stamp duty accordingly. Otherwise, the view of the authorities is that the earliest of such documents (where two or more are completed by a customer) is chargeable as a primary security to cover the highest amount at any one time due, and this, quite regardless of the value of the particular property involved ; and that the subsequent documents are chargeable, in a similar way, as collateral securities. In the event of any increase of liability beyond that so covered by stamp duty the documents may be stamped up within thirty days of such increase taking place. For this purpose the instruments are deemed to be new and separate ones bearing date on the day on which the further liability is incurred.[b] And, as regards re-conveyances (in the case, that is, of open *mortgages* to bankers ; mere memoranda under hand only not being liable to any duty on vacation), unless the securities were expressly limited, these, likewise, are liable for stamp duty on the highest amount of the indebtedness at any one time secured. Each re-conveyance is chargeable with the 6d. per cent. duty, except that the duty chargeable on all but the last is limited to 10s.

It is a little difficult to understand the view taken by the Board of Inland Revenue with regard to this matter. The point is one of no small importance to bankers, especially in connection with legal mortgages, which, as we have seen, constitute links in the chain of title.

It may be added that, before the year 1888, all equitable mortgages, as well as legal ones, were chargeable with

[a] *Vide* pp. 94 and 96.

[b] Mortgages and equitable mortgages may, in the first instance, be stamped within thirty days.

the 2s. 6d. rate. Many bankers, then, held memoranda of deposit, as a general rule, unstamped. Neither mortgages nor memoranda of deposit are rendered invalid by neglect to stamp : the point is that, until they are properly stamped, they are inadmissible as evidence in courts of law or equity. They may be stamped at any time, apparently, by payment of the appointed penalties in addition to the duties ; and " an instrument stamped after execution operates as from execution, not merely as from date of stamping."[a]

As regards copyhold and customary estates.

The stamp duties are the same as in the case of ordinary purchase deeds and mortgages. The instruments so chargeable are : (*a*) If no surrender is necessary, the actual deed of conveyance. (*b*) In other cases, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender, if made in court.

A deed of covenant to surrender, immediately preceding the actual surrender, is chargeable as is the actual surrender (whether on sale or mortgage), but with a maximum duty of 10s.

In the exceptional case of a mere memorandum of deposit of copyholds deed being taken, the duty chargeable is the same as in the case of other title deeds.

As regards registered land.

The stamp duties chargeable are the same as on similar dispositions made by unregistered instruments.

On acknowledgment for production of deeds.

If under hand only, 6d.

If under seal, 10s.

Adjudication stamps.

The Commissioners of Inland Revenue may adjudge the stamp duty to which any deed or instrument is liable, and

[a] Lecture by Mr. Bernard Campion before the Institute of Bankers, as reported in their *Journal* for January, 1907.

affix a stamp denoting it to be properly stamped ; after which the sufficiency of the duty cannot be questioned. The Commissioners may also adjudge deeds as not being liable to stamp duty. Adjudication does not extend to any instrument chargeable with *ad valorem* duty, and made as a security for money or stock without limit, or to instruments which by law cannot be stamped after execution.

Death Duties

Succession Duty.

This is payable by persons succeeding under any disposition of, or devolution by law of, any beneficial interest in real property, upon any death.

The scale under the Succession Duty Act of 1853 was as follows :—

By	lineal descendant or ancestor . .	£1 per cent.[a]
,,	brother or sister, or their descendants	£3 ,,
,,	uncle or aunt, or their descendants	£5 ,,
,,	great uncle or aunt, or their descendants	£6 ,,
,,	any other relation, or a stranger .	£10 ,,

Under the Finance Act of 1894, the payment of the 1 per cent. succession duty in respect of property chargeable with estate duty was excused.

By the Finance Act of 1910, the scale was raised to 1, 5, 10, 10, and 10 per cent. Also, the 1 per cent. payable by lineals was revived in those cases where it had been excused under the 1894 Act. And not only so, but it was extended to the husband or wife of the testator, intestate or predecessor, except (*a*) where the estate does not exceed £15,000 ; (*b*) whatever the value of the estate, where the whole amount derived by the same person does not exceed £1,000 ; (*c*) whatever the value of the estate, where the person taking is a widow or child under 21, of the testator, intestate or predecessor, and the total amount derived by the same person does not exceed £2,000.

[a] *Vide* p. 127 *supra.*

The duty is payable on the value of an annuity equal to the annual value of the property involved, during the beneficiary's life, or in respect of the period over which he is to have the enjoyment ; and is a first charge on his interest in the property and of the interest therein of all persons claiming through him.

The Finance Act of 1894 provides that, where the net principal value of all property, real or personal, does not exceed £1,000, estate duty only is payable, and the property is exempt from succession duty. Also, that the value for succession duty, where the successor is competent to dispose, is to be the principal value, and not the life interest value as was the case under the Act of 1853.

The husband or wife of any relative pays the same rate of duty as the relative would be liable to.

Estate Duty.[a]

This is payable, under the Finance Act of 1894, on the principal value of all property, real or personal, settled or not settled, which passes on death. The graduated scale then fixed has been increased under successive Finance Acts, the latest scale, as fixed by the Act of 1919, is shown by the table on page 129.

The Act of 1914 affords certain relief in the case of quick successions.

The Finance Act of 1894 provides that a rateable part of the estate duty on an estate shall be a first charge on the property in respect of which duty is leviable ; provided that the property shall not be so chargeable as against a *bonâ fide* purchaser for value, without notice, and except in the case of property passing to an executor or administrator *as such*. " Leasehold property, even though specifically bequeathed, passes to the executor or administrator *as such*. Freehold property passing to the

[a] For further information, *vide* Soward on the Estate Duty.

Where the Principal Value of the Estate				Estate Duty shall be payable at the Rate per Cent. of
Exceeds	£100	and does not exceed	£500	1
,,	£500	,, ,,	£1,000	2
,,	£1,000	,, ,,	£5,000	3
,,	£5,000	,, ,,	£10,000	4
,,	£10,000	,, ,,	£15,000	5
,,	£15,000	,, ,,	£20,000	6
,,	£20,000	,, ,,	£25,000	7
,,	£25,000	,, ,,	£30,000	8
,,	£30,000	,, ,,	£40,000	9
,,	£40,000	,, ,,	£50,000	10
,,	£50,000	,, ,,	£60,000	11
,,	£60,000	,, ,,	£70,000	12
,,	£70,000	,, ,,	£90,000	13
,,	£90,000	,, ,,	£110,000	14
,,	£110,000	,, ,,	£130,000	15
,,	£130,000	,, ,,	£150,000	16
,,	£150,000	,, ,,	£175,000	17
,,	£175,000	,, ,,	£200,000	18
,,	£200,000	,, ,,	£225,000	19
,,	£225,000	,, ,,	£250,000	20
,,	£250,000	,, ,,	£300,000	21
,,	£300,000	,, ,,	£350,000	22
,,	£350,000	,, ,,	£400,000	23
,,	£400,000	,, ,,	£450,000	24
,,	£450,000	,, ,,	£500,000	25
,,	£500,000	,, ,,	£600,000	26
,,	£600,000	,, ,,	£800,000	27
,,	£800,000	,, ,,	£1,000,000	28
,,	£1,000,000	,, ,,	£1,250,000	30
,,	£1,250,000	,, ,,	£1,500,000	32
,,	£1,500,000	,, ,,	£2,000,000	35
,,	£2,000,000			40

executors or administrator by virtue of the Land Transfer Act, 1897, does not pass to them *as such*, and the purchaser should see the duty is paid."[a]

By the Act of 1910, the period preceding the death of the deceased before which a disposition purporting to operate as an immediate gift *inter vivos* must have been made, in order that the relative property may not be included as property passing on the death of the deceased, was increased from one year to three.

[a] Emmet's *Notes on Perusing Titles*.

Fire Insurance

English fire policies are not subject to the general *law of average,* as are those of foreign offices. By this is meant that, if a property be not insured up to the full value, and a fire occur, it is the custom amongst English offices to compensate to the full extent of the loss incurred ; whereas a foreign office would only pay such a proportion of the actual loss incurred as the amount insured for bore to the full value of the property.[a]

No office, however, will, on the occasion of a fire, pay more than the actual ascertained loss, whatever the property may have been insured for.

In English policies, an average clause is sometimes expressly inserted, especially where there are several adjacent trade buildings to be insured, with shifting stocks. Moreover, the conditions appearing in small print on the back of most policies usually provide, amongst other things, for average liability only, in the event of the property insured being, at the time of the happening of a fire, insured with any other office ; and this, too, whether the other policy be taken out by the insured or by another person. This stipulation, perhaps, is reasonable enough, resting, as it does, on the recognised doctrine of *subrogation.* As Hutchison says,[b] " The insurer, on payment, is entitled to be subrogated to every right of the insured, whether in contract fulfilled, or unfulfilled, or in tort, which is capable of being insisted on, or to any other right, legal or equitable, whether it has accrued or not, by the accruing of which the loss of the insured is or can be diminished."

For this reason it is very desirable that additional policies should be taken out in the same office as that in which the property is already insured ; as, for instance in the case of a mortgagee insuring his interest ;[c] and,

[a] English *marine* policies are subject to the general law of average.
[b] Hutchison's *Practice of Banking* (Vol. III).
[c] Only a person having an insurable interest can recover under a fire policy.

particularly, that of a second mortgagee (as a *first* mortgagee usually requires lodgment of any already existing policy).

As a rule, a first mortgagee will get the office to endorse on the policy a memorandum of his interest ; or, a new policy may be taken out in the joint names of the owner and the mortgagee as such.

As we have seen, under section 19 of the Conveyancing Act of 1881, a mortgagee has power to insure the mortgaged property in the event of the mortgagor failing to do so, adding premiums to principal.

Section 23, sub-section 3, provides that :—

" All money received on an insurance effected under the mortgage deed, or under this Act, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received."

And the following sub-section reads :—

" Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage."

It may be added that, under the provisions of an Act passed in the reign of George III, it is open to " any person interested," to require, on the occasion of a fire, that the insurance moneys be laid out in rebuilding or repairing the premises. Notice must be given to the office, however, before the money is paid over.

Finally, a leaseholder is liable to pay rent after the premises are burnt down, unless there be an agreement to the contrary. It is not sufficient that he be expressly exempted from liability for damage by fire.

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END

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